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When Conflicts Polarize Communities: Designing Localized Offices That Intervene Collaboratively

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Days of demonstrations, arrests, looting, and violence followed the 2014 police shooting of Michael Brown, an African-American teenager in Ferguson, Missouri.¹ Five days after the shooting, Attorney General Eric Holder announced that the U.S. Department of Justice was investigating, and—of particular interest for this article—said that staff members from the Justice Department’s Community Relations Service (CRS) were “on the ground” in Ferguson to work with law enforcement and “civil and faith leaders” to “reduce tensions.”² Holder added that “[o]ver time, these

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¹ See, e.g., Julie Bosman & Alan Blinder, *Midnight Curfew in Effect for Ferguson*, N.Y. TIMES (Aug. 16, 2014), <http://www.nytimes.com/2014/08/17/us/ferguson-missouri-protests.html?hp&action=click&pgtype=Homepage&version=LedeSum&module=first->

² Press Release, Dep’t of Justice Office of Public Affairs, Statement by Attorney General Eric Holder on Latest Developments in Ferguson, Mo. (Aug. 14, 2014), <http://www.justice.gov/opa/pr/2014/August/14-ag-854.html> [hereinafter Attorney General, Aug. 14, 2014]; Press Release, Dep’t of Justice Office of Public Affairs, Attorney General Statement on Latest Dev. in Federal Civil Rights Investigation in Ferguson, Mo. (Aug. 18, 2014), <http://www.justice.gov/opa/pr/2014/August/14-ag-873.html> (“To assist on this front, the Department will be dispatching additional representatives from the Community Relations Service, including Director Grande Lum, to Ferguson.”) [hereinafter Attorney General, Aug. 18, 2014]; Barack Obama, President, U.S., The President Speaks on Iraq and Ferguson (Aug. 18, 2014), <http://www.whitehouse.gov/photos-and-video/video/2014/08/18/president-speaks-iraq-and-ferguson#transcript> (“We’ve also had experts from the DOJ’s Community Relations Service working in Ferguson since the days after the shooting to foster conversations among local stakeholders and reduce tensions among the community.”).

conversations [instigated by CRS intervenors] should consider the role that increased diversity in law enforcement can play in helping to build trust within the communities.”³ After another week of unrest,⁴ arrests diminished,⁵ but law enforcement’s initial responses, perhaps before CRS intervenors developed working relationships with local officials,⁶ still angered parts of the community. Some people viewed the early police responses as evidence

³ Attorney General, Aug. 14, 2014, *supra* note 2; Neil A. Levine, *Hands Up, Don't Shoot: A Case for the Community Relations Service*, FEDERAL TIMES (Aug. 25, 2014), <http://www.federaltimes.com/article/20140825/BLG05/308250013/Hands-up-don-t-shoot-case-Community-Relations-Service>; Richard A. Serrano, *Eric Holder's Trip to Ferguson, Mo., Rooted in His Civil Rights Pledge*, L.A. TIMES (Aug. 20, 2014), <http://www.latimes.com/nation/la-na-ferguson-holder-20140820-story.html#page=1>; Emily Brown, *Timeline: Michael Brown Shooting in Ferguson, Mo.*, USA TODAY (Aug. 22, 2014), <http://www.usatoday.com/story/news/nation/2014/08/14/michael-brown-ferguson-missouri-timeline/14051827/>; Yamiche Alcindor et al., *Hundreds of Peaceful Protesters March in Ferguson*, USA TODAY (Aug. 19, 2014), <http://www.usatoday.com/story/news/nation/2014/08/14/ferguson-missouri-police-clashes-shooting-anonymous/14046707/> (reporting that on August 14, Governor Jay Nixon asked the head of the Missouri State Highway Patrol to take charge of the law enforcement actions in Ferguson, and the law enforcement approach became less confrontational regarding demonstrators); Charles Pulliam-Moore & Margaret Myers, *Timeline of Events in Ferguson*, PBS NEWSHOUR, Aug. 20, 2014, <http://www.pbs.org/newshour/rundown/timeline-events-ferguson/> (August 14 report). *See also* Attorney General, Aug. 18, 2014, *supra* note 2 (announcing on August 18 that additional CRS staff, including the director, would go to Ferguson “to convene stakeholders whose cooperation is critical to keeping the peace.”); David Hunn, *The Justice Department's Soft Side: How One Federal Agency Hopes to Change Ferguson*, ST. LOUIS POST-DISPATCH, Oct. 11, 2014, http://www.stltoday.com/news/local/govt-and-politics/the-justice-department-s-soft-side-how-one-federal-agency/article_591a2e64-7dd1-5008-b300-0ab9ad8b9168.html (CRS mediators arrived a little more than a day after the shooting).

⁴ Brown, *supra* note 3 (reporting on August 21 that the preceding night had been the first night of “relative calm since [Michael] Brown was killed on Aug. 9.”).

⁵ Carol D. Leonnig, David Nakamura & William Branigin, *Missouri Gov. Jay Nixon Withdraws National Guard from Ferguson, as Clashes Subside*, THE WASH. POST, Aug. 21, 2014.

⁶ Evan McMorris-Santoro, *Sanford, Florida, Mayor Urges Ferguson to Welcome Obama Administration's Help*, BUZZFEED NEWS, Aug. 20, 2014, <http://www.buzzfeed.com/evanmcsan/doj-in-ferguson#1jirioh> (noting that state officials seemed to be acting without first consulting with CRS, for example, in calling in the National Guard); Willis Ryder Arnold, *Department of Justice Representatives Stress Communication at Friday Night Meeting*, ST. LOUIS PUBLIC RADIO, Aug. 29, 2014, <http://news.stlpublicradio.org/post/departement-justice-representatives-stress-communication-friday-night-meeting> (CRS intervenors were in Ferguson four days earlier).

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of contempt for African-American residents; others in the community continued to express their support for the police.⁷ National polling indicated a troubling racial division in the aftermath of this incident.⁸

Ferguson is not unusual.⁹ In 2012–2014, one could list community-wide polarized conflicts in Anchorage, Alaska; Brooklyn, New York; Pueblo, Colorado; Arlington, Texas; Waterloo, Iowa; Saginaw, Michigan—no region of the country seemed exempt.¹⁰ Some conflicts relate to police actions;

⁷ Josh Levs, *Ferguson Violence: Critics Rip Police Tactics, Use of Military Equipment*, CNN, Aug. 15, 2014, <http://www.cnn.com/2014/08/14/us/missouri-ferguson-police-tactics/>; Elisa Crouch, *Michael Brown Laid to Rest with Recollections and Calls to Action*, ST. LOUIS POST-DISPATCH (Aug. 25, 2014), http://www.stltoday.com/news/local/metro/michael-brown-laid-to-rest-with-recollections-and-calls-to/article_a62a9b90-0910-5b34-b187-170c35cfa4be.html; *Ferguson Videos: Interviews, Rallies and More*, ST. LOUIS POST-DISPATCH (Aug. 14, 2014), http://www.stltoday.com/news/multimedia/ferguson-videos-interviews-rallies-and-more/html_4e061015-9755-5586-af69-c11bf6b4e19a.html (“protesters support officer Darren Wilson”).

⁸ Tanzina Vega & Megan Thee-Brenan, *Poll Shows Broad Divisions Amid Missouri Turmoil, Stark Racial Divisions in Reactions to Ferguson Police Shooting*, N.Y. TIMES (Aug. 21, 2014), http://www.nytimes.com/2014/08/22/us/on-ferguson-unrest-poll-shows-sharp-racial-divide.html?_r=0 (“An overwhelming majority of blacks say they think that, generally, the police are more likely to use deadly force against a black person; a majority of whites say race is not a factor in a police officer’s decision to use force.”); *Stark Racial Divisions in Reactions to Ferguson Police Shooting*, PEW RESEARCH CENTER (Aug. 18, 2014) (“By about four-to-one (80% to 18%), African Americans say the shootings in Ferguson raise important issues about race that merit discussion. By contrast, whites, by 47% to 37%, say the issue of race is getting more attention than it deserves.”).

⁹ CRS reports 317 “administration of justice” interventions in Fiscal Year 2013, 36 over “excessive use of force/police misconduct.” U.S. DEPARTMENT OF JUSTICE COMMUNITY RELATIONS SERVICE ANNUAL REPORT 2013 22, 31–32, 38, 40, 45, 48, 52, 58 (2014) (hereinafter 2013 CRS ANNUAL REPORT).

¹⁰ CRS’s 2013 fiscal year report cited police use of force issues in Pueblo, Colorado; Brooklyn, New York; Laurel, Maryland; Saginaw, Michigan; Arlington, Texas; Waterloo, Iowa; Coralville, Iowa; Anchorage, Alaska; and New Bedford, Massachusetts. *Id.* See also *infra* text accompanying notes 26–34, 145–152, 201–207, 228–235; JAMES S. COLEMAN, COMMUNITY CONFLICT 2 (1957) (“Controversies within communities are as old as civilization itself”); Kami Chavis Simmons, *Ferguson Events Highlight Continued Tensions Between Police and Poor Urban Residents*, HUFFINGTON POST (Aug. 19, 2014), http://www.huffingtonpost.com/kami-chavis-simmons/ferguson-events-highlight_b_5692699.html (In Ohio alone, police killings of African-American residents spurred demonstrations in four cities between 2001 and 2014, one involving rioting); *Crowd Holds Vigil, Marches Downtown for Shooting Victim*, THE LIMA NEWS (Aug. 23, 2013), http://www.limaohio.com/news/local_news/article_45b15fbd-d65c-5902-9167-6ebbed4c6f05.html#_U_aKJUtW3eM; Christopher Maag, *Police Shooting of Mother and Infant Exposes a City’s Racial Tension*, N.Y. TIMES (Jan. 30, 2008), http://www.nytimes.com/2008/01/30/us/30lima.html?_r=; Jane Predergast, *2001 Riots*

others involve environmental concerns about land use and legalization of abortion, to name a few examples.¹¹ Regardless of the subject of the conflict, it seems that a shocking—often-tragic—incident ignites existing divisions within a community. The trigger incident may provoke some to demonstrate and others to destroy property or use weapons. As conflict escalates, not only do people differ on the issue, but they also develop contempt for the contrary viewpoint and the tactics that the “other group” is employing. Increasingly, people are not listening to opposing arguments. The antagonists have become polarized.¹² Public officials restore outward order, but the unrest and

Led to Top-Down Change for Cincinnati Police, THE CINCINNATI ENQUIRER (Apr. 3, 2011) http://usatoday30.usatoday.com/news/nation/2011-04-03-cincinnati-riots-anniversary_N.htm; Connie Bloom, *Marchers Return to City Hall, Protesters Resume Call for Investigation of Police Shooting, Chief's Resignation*, AKRON BEACON JOURNAL (Sept. 16, 2008), <http://www.ohio.com/news/marchers-return-to-city-hall-1.106596>; Nick Brennan, *Hundreds Protest Police Shooting at Ohio Walmart*, UPPER MICHIGAN SOURCE (Aug. 30, 2014), <http://www.uppermichiganssource.com/news/story.aspx?id=1090531#.VEWDpkvjveM>.

¹¹ 2013 CRS ANNUAL REPORT, *supra* note 9, at 23. See *infra* text accompanying notes 12, 201–07. See COLEMAN, *supra* note 10, at 4–5 (examples historically).

¹² This article uses the term “polarized conflict” to mean conflict in which portions of the community consider themselves antagonists and have stopped listening to the views of other portions. See COLEMAN, *supra* note 10, at 11 (noting that in polarization, “[p]eople break off long-standing relationships, stop speaking to former friends who have been drawn to the opposition, but proliferate their associations with fellow-partisans.”). People disagree about what is counter-productive, a matter discussed further *infra* in Part III.A. Others refer to similar sorts of conflicts as public policy disputes, identity group-based conflicts, protracted social conflicts, intractable conflicts, enduring rivalries, or factions. See, e.g., SUSAN L. PODZIBA, CIVIC FUSION: MEDIATING POLARIZED PUBLIC DISPUTES 75-96 (2012) (“public policy disputes”) (regarding conflict surrounding legalization of abortion and other conflicts); Jay Rothman & Michal Alberstein, *Individuals, Groups and Intergroups: Theorizing about the Role of Identity in Conflict and Its Creative Engagement*, 28 OHIO ST. J. ON DISP. RESOL. 631, 635–636 (2013) (“identity group-based conflicts”) (“[W]e view identity as a distinct set of core concerns determined by group loyalties, social ideologies, and identification with specific social narratives and history and particular expressions of culture.”); EDWARD E. AZAR, THE MANAGEMENT OF PROTRACTED SOCIAL CONFLICTS: THEORY AND CASES (1990) (“protracted social conflicts”); CHESTER A. CROCKER ET AL, TAMING INTRACTABLE CONFLICTS: MEDIATION IN THE HARDEST CASES (2004) (“intractable conflicts”); Jacob Bercovitch, *Mediation in the Most Resistant Cases*, in GRASPING THE NETTLE: ANALYZING CASES OF INTRACTABLE CONFLICT (CHESTER A. Crocker et al. eds., 2005) (“intractable conflicts”); PAUL F. DIEHL AND GARY GOERTZ, WAR AND PEACE IN INTERNATIONAL RIVALRY (2000) (“enduring rivalries”); THE FEDERALIST NO. 10 (James Madison) (“factions”) (Madison noted that factions arise from a variety of distinctions, not limited to religion, views of government, and attachments to persons vying for power, and have “divided mankind into parties, inflamed them with mutual animosity, and

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governmental response may deepen the bitterness between antagonistic groups. Afterward, the disagreements may not be channeled into a process through which decisions can be made about what long-term changes are warranted.

This article suggests that officials change this all-too-common story by developing public offices of “intervenor” (a word used throughout the article for simplicity instead of public policy mediators, conciliators, peacemakers, and a variety of other terms in use).¹³ These offices might be at

rendered them much more disposed to vex and oppress each other, than to cooperate for their common good.”). 2012–2014 popularized the term “polarization” to deal with widespread and potentially destructive antagonism – whether within a community or within political institutions, such as Congress. Drew Desilver, *Partisan Polarization, in Congress and Among Public, Is Greater than Ever*, PEW RESEARCH CENTER (2013), <http://www.pewresearch.org/fact-tank/2013/07/17/partisan-polarization-in-congress-and-among-public-is-greater-than-ever/>. Interest in community polarization may have been enhanced by fever-pitch concern about political polarization more generally. THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS* 101 (2013) (“The single-minded focus on scoring political points over solving problems, escalating over the last several decades, has reached a level of such intensity and bitterness that the government seems incapable of taking and sustaining public decisions responsive to the existential challenges facing the country.”); AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT* 3–4 (2012) (“Compromises are difficult for many reasons, including increased political polarization and the escalating influence of money in democratic politics.”).

¹³ As used here, intervenors assess the situation and engage those within the community in processes leading to consensus, greater understanding, and other goals. The intervenor may resemble a mediator when the intervenor shuttles among stakeholders. But intervenors may perform additional tasks—create new collaborative processes, educate, engage experts, set up rumor control centers, and much more, including such unusual activities as running into the midst of a mob attacking an individual to reason with the people long enough to permit its victim to slip away. Susan Carpenter, *Choosing Appropriate Consensus Building Techniques and Strategies*, in *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* 61, 62–82 (Lawrence Susskind et al. eds., 1999) [hereinafter Carpenter, 1999]; J. MICHAEL GREIG & PAUL F. DIEHL, *INTERNATIONAL MEDIATION* 6–18 (2012). Others call them public policy mediators, civil rights mediators, conciliators, conciliation specialists, facilitators, or peacemakers. See, e.g., BERTRAM J. LEVINE, *RESOLVING RACIAL CONFLICT: THE COMMUNITY RELATIONS SERVICE AND CIVIL RIGHTS, 1964–1989* 24, 167 (2005) (conciliators); COMMUNITY RELATIONS SERVICE, <http://www.justice.gov/crs> (last visited Feb. 23, 2015) (peacemakers, conciliators); 2013 CRS ANNUAL REPORT, *supra*, note 9, at 9, 11 (conciliation specialists, facilitators); PODZIBA, *supra*, note 12, at 75–96 (public policy mediators); James Laue & Gerald Cormick, *The Ethics of Intervention in Community Disputes*, in *THE ETHICS OF SOCIAL INTERVENTION* 205, 208, 212 (Gordon Bermant et al. eds., 1974) (intervenor, mediator); Civil Rights Mediation Oral History

the state, regional, or local level depending on leaders' interest in establishing the offices as well as whether the population and conflict type or level would give intervenors enough to do. The offices of intervenors would not replace the vital and tough role played by law enforcement in keeping order and by other public officials in responding to demonstrators' concerns. But this article suggests that intervenors—if institutionalized effectively—can often stop the conflict from escalating and add the critical dimension of getting people in polarized communities to deliberate about ways to solve, or at least ameliorate, the problems underlying their differences.

These suggested state or local intervenors would augment not only the roles currently played by local public officials but also the work of the highly respected Community Relations Service of the U.S. Justice Department.¹⁴ Established by the Civil Rights Act of 1964,¹⁵ CRS employs about sixty people, thirty-five of whom intervene in volatile local conflicts like the one in Ferguson, Missouri involving civil rights or hate crimes issues.¹⁶ Given their high quality and experience, why not simply rely on CRS intervenors to deal with polarized community conflicts?

Part I explains that localized versions of CRS can improve results as they guide the crucial first responses by police and local officials, speed acceptance of CRS intervenors, shoulder some of the burden, and intervene in conflicts that CRS cannot handle. After CRS intervenors leave, these local intervenors can also follow up to increase understanding across groups and build consensus on what to do about the issues that have polarized the community. The local intervenors can do preventive work as well. Institutionalizing an intervention capacity at the state or local level requires more than money though, in part because of the ways that experienced intervenors work.

Part II discusses the eclectic and nimble approaches that intervenors employ in the midst of volatile conflict. An intervenor in these contexts is not “your usual” mediator.

Part III suggests ways to deal with the challenges that these wide-ranging intervenor activities create for those designing a public intervenor office. It also discusses another challenge for designers: intervenors must strike a

Project (1999), CIVIL RIGHTS MEDIATION, <http://www.civilrightsmediation.org> (last visited Feb. 23, 2015) [hereinafter Oral History Project] (civil rights mediators).

¹⁴ See, e.g., 2013 CRS ANNUAL REPORT, *supra*, note 9, at 3-5 (reporting that the Association for Conflict Resolution gave its 2013 Peacemaker Award to CRS); Hunn, *supra* note 3; Levine, *supra* note 3; McMorris-Santoro, *supra* note 6.

¹⁵ 42 U.S.C.S. § 2000g (2015); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §4707.

¹⁶ See *infra* text accompanying notes 45-47.

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balance between getting out of the way of constructive conflict and helping to de-escalate destructive conflict (and determine which is which). After all, providing state or local capacity to intervene does not diminish the importance of getting the basic public decisionmaking right—providing equal justice, for example—and should not undermine the constructive role that conflict can play in achieving that goal.¹⁷ Conflict can offer those who care deeply about an issue a means to pressure others to address it.¹⁸ Conflicts between groups can sharpen issues for democratic decisionmaking.¹⁹ Because of these complex public policy considerations, who decides whether and how to intervene matters.

CRS's 50-year history provides a fertile source of ideas for state and local officials dealing with these design challenges—such as that of striking a balance between encouraging constructive conflict and defusing destructive conflict—that are unique to intervening in polarized conflict, and the article draws on that history.²⁰ Unfortunately, the CRS model does not translate perfectly to the state and local level. In other words, CRS represents the gold standard but not the silver bullet for institutionalizing state and local equivalents.

To guide those designing the state and local versions of CRS, this article suggests an approach that can be ready “off the shelf” for those moments when a state or local government decides to fund intervention in polarized conflict. Something “off the shelf” seems especially appropriate because state and local governments seem to fund intervenors intermittently.²¹ These offices, as a consequence, are often new to the task. Those designing them may make mistakes due to lack of experience.²² Also, the institutional home may not be the ideal one—just the public agency headed by a leader willing

¹⁷ See *infra* Part III.A. Craig Zelizer, *Preface to*, in *INTEGRATED PEACEBUILDING: INNOVATIVE APPROACHES TO TRANSFORMING CONFLICT* xi, xii (Craig Zelizer ed., 2013); SUSAN L. CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS, AND CITIZENS' GROUPS* 3-4 (1988).

¹⁸ See *infra* Part III.A. Zelizer, *supra* note 17, at xii; CARPENTER & KENNEDY, *supra* note 17, at 3-4.

¹⁹ CARPENTER & KENNEDY, *supra* note 17, at 3-4.

²⁰ See generally LEVINE, *supra* note 13, at 21-44, 226-244 (reviewing the decision-making on these points as CRS developed).

²¹ See *infra* text accompanying notes 228-235, 269. See COLEMAN, *supra* note 10, at 2 (discussing periods prior to the start of the CRS and noting that communities seemed to handle polarizing conflict using a “trial and error process”).

²² COLEMAN, *supra* note 10, at 2 (“Since controversy arising out of a particular kind of crisis is not likely to occur frequently in a community, each community has little opportunity to evolve, in a number of trials, the optimal procedures for handling disagreements.”).

to build the capacity to intervene in polarized community conflicts.²³ Added to these challenges, the agency may be forced to act quickly in response to crises, with little time to consider the optimal structure. To facilitate this constant invention and reinvention of an office of intervenors, the article poses three questions that take into account broad experiences with institutionalizing intervenors and that can be raised regardless of the size, level of government, and institutional placement of the localized intervenors. These “off-the-shelf” questions reflect the policy and practice issues unique to intervening in polarized community conflicts:

A. the difficulty of taking into account both strategy concerns and the public interest in decisionmaking about whether, how deeply, and when to intervene;

B. the tensions between creating a supportive climate and culture for intervenors and making the intervenors accountable to the public funder; and

C. the often-competing aims of developing the potential participants’ trust in the intervention and intervenor, protecting the public agency’s other roles, and finding the needed range of resources.

I. SANFORD, FLORIDA AND MORE: ILLUSTRATIONS OF THE VALUE OF LOCAL INTERVENORS

One only need to look back a year to find a story that contrasts with that of Ferguson, Missouri and illustrates the value of using local collaborative dispute resolution capacity to augment a federal intervention by the U.S. Department of Justice’s Community Relations Service (CRS).²⁴ Rival demonstrations in Sanford, Florida, in 2012–2013 followed decisions regarding whether to arrest, prosecute, and convict the neighborhood watch volunteer who killed Trayvon Martin, an African-American teenager, as he walked back with a snack from a convenience store.²⁵ Told through the eyes of Andrew Thomas, a local official who intervened in the aftermath of the Trayvon Martin shooting, the story below illustrates the range of the local intervenor’s activities and gives the reader a sense of why they mattered.²⁶

²³ See *infra* text accompanying notes 107–18.

²⁴ See *infra* text accompanying notes 50–61.

²⁵ See *infra* text accompanying notes 26–34.

²⁶ Telephone interview with Andrew Thomas, (January 30, 2014); Email from Andrew Thomas, to author (March 13, 2014, 5:03 p.m.) (on file with author).

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The history of the City of Sanford in central Florida left many of its African-American residents distrustful of the police in particular and of city and state officials in general. Residents of west Sanford, an area that once was the historically African-American city of Goldsboro, resented what they believed to be an effort by Sanford and Florida a century ago to dissolve Goldsboro's incorporation so that Sanford could take over the area.²⁷ Some of these residents believed that Sanford officials discriminated in provision of services to the former Goldsboro area. They also believed that the police took violence less seriously when the victim was African-American.²⁸

Concerned about the divide among residents and alienation from their government, the city manager, a trained mediator, called upon Andrew Thomas, senior project manager in the City Manager's Office. Thomas had moved to Florida after his retirement, having mediated hundreds of conflicts and directed the Rochester, New York Center for Dispute Settlement for 26 years. Thomas started work in Sanford in 2010 as coordinator of the community development block grants program. Thomas also focused on the divide among residents, placing a high priority on building a trusting relationship with law enforcement.

In 2012 George Zimmerman, a neighborhood watch volunteer, shot and killed Trayvon Martin. Some doubted that police and prosecutors would move aggressively to investigate and prosecute, if prosecution was warranted, because the teenager was African-American and the shooter was not. When the Sanford Police Department did not immediately arrest George Zimmerman, a group of African-American residents issued demands related both to the arrest and prosecution of Zimmerman and to their concerns about broader racial injustice within Sanford. Once the state appointed a special prosecutor, and the prosecution of Zimmerman began, the legal system's response to the shooting moved to the prosecutor's and court's domains.

Some city officials spoke optimistically about resolving the concerns about and moving past what they viewed as a single incident, but Andrew Thomas had a different view. Thomas had been talking with African-American residents in the former Goldsboro area and understood their deep convictions about injustice more broadly in Sanford. The issues would have to be shaped over time, and they would be broader than Zimmerman's shooting of Trayvon Martin. Moreover, having worked in polarized

²⁷ *Id.*; *Students Find Treasure in Goldsboro*, 14 SANFORD HIST, SOC'Y NEWSL. May-June 2007, at 1, 4, <http://sanfordhistory.tripod.com/newsletters/may2007.pdf>. See generally GOLDSBORO MUSEUM, <http://www.goldsboromuseum.com>.

²⁸ Cara Buckley, *Police Chief in Florida Tries to Ease Old Tensions*, N.Y. TIMES (June 16, 2013), http://www.nytimes.com/2013/06/17/us/in-city-of-zimmerman-trial-police-chief-navigates-race-relations.html?pagewanted=all&_r=0.

situations before, Thomas predicted that national groups of various kinds and media would arrive within days and would assert additional demands and viewpoints. These groups would sometimes attract crowds and sometimes seek confrontation.

Thomas had no authority to decide how Sanford would act. Though he already knew city officials, Thomas needed to persuade them to take his counsel seriously on these new issues. He advised city officials to talk with counterparts in communities where similar incidents had occurred so that they could better assess the likely course of events in Sanford. As a result, Sanford officials recognized that Sanford could face disruption, costs, and potentially violence, and that they should not wait to intervene in the unfolding events, even though doing so would require—at least in the near term—enormous resources and changes in the ways that they conducted business. They would have to develop a unique approach—responsive to the issues in Sanford. Thomas explained later, “There is no cookie cutter” for dealing with polarized conflicts like the one in Sanford in 2012.

Because many African-American residents distrusted the city officials, city officials asked the Community Relations Service at the U.S. Department of Justice to send mediators to improve relationships across the communities within Sanford.²⁹ If CRS mediators succeeded, that would give some resilience to the community in the coming months as national media and national groups arrived and might ultimately make it possible to have a cross-community dialogue about the issues that divided the city’s residents. CRS recognized the potential for serious consequences in Sanford and sent mediators from a number of regional offices. Sanford and CRS officials agreed that CRS would first build relationships among the clergy in Sanford; the clergy after all cared about a peaceful resolution, and people from a variety of Sanford’s communities trusted their pastors.³⁰

²⁹ Arelis R. Hernandez, DOJ ‘Peacemakers’ Helped Sanford Stay Cool Amid Rising Tensions, ORLANDO SENTINEL, April 15, 2012, LEXIS, News Library, (quoting the president of the Seminole County NAACP chapter regarding CRS mediators, “‘People are more relaxed and satisfied when they know they have someone from the outside, like the DOJ who have no ties to the community to try and relax the emotions.’”); Audra D.S. Burch, *Federal Mediator Thomas Battles Serves as Peacemaker in Sanford*, MIAMI HERALD, July 5, 2013, LEXIS, News Library.

³⁰ *Profiles in ADR: Grande Lum*, 20 DISP. RESOL. MAG. 41, 42 (2013–2014) [hereinafter *Profiles in ADR*] (noting also CRS’s role in coordinating responses to three demonstrations and a sit-in, rumor control, a sit-in, and police training). See Burch, *supra* note 29 (“Among his first tasks: [CRS mediator Thomas] Battles rallied about 70 or 80 Sanford-area ministers—of varying races and faiths—and talked to the group about the role they should play in bringing peace back to the city. ‘The idea was to bring different

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Building the residents' trust toward their city officials presented another challenge. With advice from Thomas, city officials decided to be aggressively open in their actions and to be welcoming to residents or outsiders alike. For example, rather than close people out of a pivotal City Council meeting on March 26, 2012, just weeks after the incident, they moved the meeting to a large arena and put up giant screens in the park for the overflow audience.

The city needed a means to control rumors. By the time Zimmerman's trial occurred in 2013, the local clergy had formed an association, Sanford Pastors Connecting, that met regularly,³¹ and the Sanford Police Department, CRS, and the County Sheriff's Office reserved seats in the courtroom that could be rotated among members of that association. The pastors could provide information to members that would be trusted.

In time, Thomas helped facilitate conversations about changes in Sanford. The community would remain divided until residents believed that the police would act justly toward all residents. A community-wide citizen group conducted a review of the police department. In response to that group's report, the department began making changes, reporting progress publicly every few months.³² For the first time in memory, residents participated in a significant way in the choice of a new police chief. Regular discussions began about other changes in Sanford.³³ Thomas recalled that it was challenging to make progress in these talks because public meetings laws required them to allow media coverage, but they made progress nonetheless.

In the meantime, local and outside groups continued to organize events. Anticipating this, local officials and residents had decided how to respond. They met outsiders who arrived in the city, and welcomed them. At rallies organized by national organizations, with busloads of participants coming in from around the state, the city provided ground transportation for the elderly and others who could not walk to the site.

Crowds sometimes swelled to 35,000 in this community of 55,000. Thomas and CRS mediators mixed in with the crowds. When outside groups marched to the stage of the event to provoke a confrontation, the local participants were ready. They yielded the stage to avoid the confrontation.

kinds of people into the same room and get them to talk,' said Rev. Charles Holt, of St Peter's Episcopal Church in neighboring Lake Mary.”).

³¹ Burch, *supra* note 29.

³² See discussion of progress in *Sanford Takes Precautions Ahead of Zimmerman Verdict*, NPR (July 12, 2013), <http://hereandnow.wbur.org/2013/07/12/zimmerman-verdict-precautions>.

³³ Police asked CRS to conduct trainings. 2013 CRS ANNUAL REPORT, *supra* note 9, at 42–43.

In time, CRS resources had to be used elsewhere so more of the burden fell on Sanford officials. Law enforcement costs increased dramatically during this period. When various groups' demands were presented to Sanford officials, they offered to discuss them, and sometimes made changes. Sanford hired a public relations firm so that the city could respond to media requests in a timely way.

No violence occurred in Sanford during these demonstrations. Sanford's police made no arrests. Local talks continue, and Thomas sees people talking with each other who would not have done so a few years ago. The police continue to change. Residents remain engaged. Thomas expects that it will take more time, though he says that, increasingly, people are proud to be Sanford residents.

The story indicates what Andrew Thomas added to the mix. First, Thomas could guide the Sanford officials, who knew and trusted him and therefore would listen, to optimize their crucial first reactions when unrest erupted.³⁴ This capacity to get involved immediately may matter less when communities have advanced warning of major disturbances, as in the 1970s when a court would announce that it would implement school desegregation measures in a subsequent year, but can be critically important in conflicts like that in Ferguson, Missouri in 2014.³⁵ Sociologist James Coleman, in his noted study of community conflicts, pointed to the advantage of having the public view its officials as a possible resource for resolution, rather than as antagonists—and these officials' first reactions may determine that.³⁶

Second, Thomas helped local officials understand the need to work with CRS and invest heavily in activities that would provide clear information, engage groups (whether Sanford residents or not) who complained, and develop processes for people to collaborate on improving law enforcement.³⁷ Not all state and city officials welcome CRS.³⁸ CRS Director Grande Lum notes that CRS' "ability to be effective is directly related to the degree of trust that [CRS] can establish with local leaders."³⁹ Someone like Andrew Thomas, whom Sanford leadership and local police already trusted, can

³⁴ See *supra* text accompanying notes 26–33.

³⁵ See *supra* text accompanying notes 1–8.

³⁶ COLEMAN, *supra* note 10, at 14–17.

³⁷ McMorris-Santoro, *supra* note 6 ("The part-time mayor of the Florida town, he said his government wasn't equipped to deal with the influx of protesters and national scrutiny following the shooting of Martin. CRS and the Justice Department gave him the tools—and contacts—his team needed to create a dialogue with protest leaders.").

³⁸ LEVINE, *supra* note 13, at 49–67 (the 1964–65 Selma, Alabama civil rights marches); see *infra* text accompanying notes 64–66.

³⁹ *Profiles in ADR*, *supra* note 30.

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hasten CRS acceptance in situations in which every hour counts.⁴⁰ For example, a reporter covering Ferguson, Missouri said that Missouri's leadership "appeared wary of federal involvement," pointing out that the Governor did not inform federal officials "before ordering the National Guard to engage."⁴¹ He reported that Sanford's mayor urged Ferguson officials to embrace the help of CRS, crediting its intervenors for the relative calm in Sanford.⁴²

Third, Thomas continues his involvement with Sanford officials and police, whereas CRS will return only as resources permit. As Sanford officials change, Thomas can advise the new officials. In addition to their contributions at the beginning of a CRS intervention, local intervenors play a critical role at the end. Lum explains, "[S]ustainable change is much more likely and longer lasting when local dispute resolution institutions are in place to provide direct intervention, continuity, monitoring and prevention services."⁴³

Fourth, a somewhat larger CRS, one four times the current size, would probably still have to prioritize among local conflicts as well as needs for conflict prevention, leaving some communities largely unserved or served only for short periods.⁴⁴ CRS handled 728 cases in fiscal year 2012 with 61 staff members (35 of whom do intervention work).⁴⁵ A CRS mediator who served during periods when CRS had more staff⁴⁶ (the staff once reached

⁴⁰ See text accompanying notes 26–34.

⁴¹ McMorris-Santoro, *supra* note 6.

⁴² *Id.* ("These guys [Justice Department advisers] have been there, done it, they're very astute," Triplett said. "We on the city side, we fix roads. We make sure your lights turn off and on. We make sure your toilets flush. We cut ribbons for new businesses. So you've got to rely on those that know."").

⁴³ Email from Grande Lum, to author (March 19, 2014, 8:55 a.m.) (on file with author) ("The legislative mandate calls for CRS to support local and state officials in resolving disputes and reducing tension and that's how it works best. While CRS often plays a first responder and intervention role, we have found that sustainable change is much more likely and longer lasting when local dispute resolution institutions are in place to provide direct intervention, continuity, monitoring and prevention services.").

⁴⁴ LEVINE, *supra* note 13, at 240 ("Among CRS's case selection criteria, problems involving violence or the threat of violence were accorded first priority. After that, high value was placed on case objectives that held out the hope for influencing long-lasting change. However, such objectives were time-consuming and successful outcomes were by no means assured. They were a luxury CRS often could not afford.").

⁴⁵ COMMUNITY RELATIONS SERVICE FY 2012 ANNUAL REPORT 3 (2013) [hereinafter 2012 CRS Annual Report]; Grande Lum, Lawrence Lecture at the Ohio State University Moritz College of Law (September 30, 2014).

⁴⁶ LEVINE, *supra* note 13, at 97 (During President Richard Nixon's first term, CRS staff reached 323, though not all staff members were intervenors).

323 persons) recalled that the answer to how long CRS could remain involved still required prioritization and depended on a number of factors:

Depends on what else is on the plate, how critical other things are in relationship to that. Whether you have the resources or have done all that you can do in relationship to it. But most of the times its priorities. When this particular case reaches the stage where it is no longer the major priority— there's one that is more volatile and more demanding that you must turn your meager resources to— then you politely and respectfully begin to ease out of the first case.⁴⁷

Of course, if CRS expands to thousands of employees—such that it could quickly reach virtually every polarized community conflict and remain in contact with the community between conflicts—in some situations CRS might substitute for the localized version that this article advocates.

Fifth, and a reason even an expanded CRS might not obviate the need for localized intervenors, CRS cannot intervene in all polarized community conflicts without a change in law. By statute, CRS has a limited scope, intervening only in civil rights conflicts or hate crimes.⁴⁸ Some polarized community conflicts discussed later in this article (e.g., grazing rights, water rights)⁴⁹ may fall outside its current limits.

Though local intervenors like Thomas augment its work for the five reasons just mentioned, CRS can make a positive difference even without a state or local intervenor, if local officials support and continue its work and

⁴⁷ Oral History Project, *supra* note 13: *Ozell Sutton* (noting also the attempts to leave in place a local structure to deal with the matter over the long term).

⁴⁸ 42 U.S.C.A. § 2000g-1 (2015) (“resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons”); Pub. L. No. 111-84, § 4707 (extending CRS jurisdiction to hate crimes “because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person”). Deputy Attorney General James M. Cole said that, “the Community Relations Service [also] serves the critical function of allowing the Department to be proactive—to improve understanding and improve relations before [hate crime violence related to gender identity and expression] incidents occur. CRS also plays a critical role in the aftermath of unfortunate events, by working to prevent additional violence by training and educating those on the ground in communities affected by anti-transgender hate crimes.” James M. Cole, Deputy Attorney General, Deputy Attorney General James M. Cole Delivers Remarks at the Community Relations Service Transgender Law Enforcement Training Launch, 2014 WL 1247021 (Mar. 27, 2014).

⁴⁹ See *infra* text accompanying notes 201–07; 228–35.

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its resources permit. To illustrate this, it is necessary to go back in history, because, for confidentiality reasons, CRS rarely discloses the details of its recent intervention work. One such example comes from Detroit in 1975 when CRS sent intervenors more than a year ahead of the court-ordered deadline for Detroit to desegregate its schools.⁵⁰ Well aware of the violence that court-ordered school desegregation triggered in Boston, the court asked CRS to come, and Detroit officials welcomed CRS help.⁵¹ CRS intervenors reviewed what had occurred after implementation of federal court school desegregation orders in other cities.⁵² Based on that review and local discussions, CRS intervenors met with over a hundred community leaders, including leaders of groups opposed to integration, to make certain that their voices were heard and to discuss with them ways that they might respond or help.⁵³ Intervenors trained hundreds of volunteers.⁵⁴ They consulted with the federal judge about his formation of a blue-ribbon monitoring commission.⁵⁵ They held briefings for media representatives.⁵⁶ Noting the role of school discipline problems post-desegregation elsewhere, CRS intervenors worked with school officials to develop fair student conduct standards and train those who would administer the discipline.⁵⁷ They counseled police to form a special task force in advance of the implementation, and CRS helped to train the task force officers.⁵⁸ They set up a communication system to deal with rumor control.⁵⁹ When busing began, CRS-trained volunteers stood at schools and bus stops throughout the city, in radio communication.⁶⁰ By the third day of desegregation, class attendance was normal, and Detroit's

⁵⁰Bradley v. Milliken, 402 F.Supp. 1096, 1132–47 (E.D. Mich. 1975) (issuing relief but noting that it had earlier in the year made findings that relief would be necessary); LEVINE, *supra* note 13, at 170–73. *See also* Milliken v. Bradley, 433 U.S. 267, 269–77 (1977) (reviewing the history of the Detroit school desegregation litigation, including the 1975 court order).

⁵¹ Bradley v. Milliken, 426 F.Supp. 929, 937 (E.D. Mich. 1977) (“[B]efore the hearings on the remedial phase of this litigation began, we requested the Community Relations Service of the United States Department of Justice to assist the City of Detroit and the court in achieving the harmonious implementation of the court-ordered desegregation plan for the Detroit city schools (Order, Apr. 30, 1975).”); LEVINE, *supra* note 13, at 170–73.

⁵² LEVINE, *supra* note 13, at 170–73.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

leaders acknowledged that the CRS-instigated preparation had helped avoid the unrest that had rocked Boston's school desegregation (several months of violence within schools, stoning of buses, and low school attendance).⁶¹ In this example, local officials immediately welcomed federal help, and they had months to prepare for implementation—two aspects of the Detroit situation that reduced the need for local intervenors.

In sum, despite CRS's documented contributions even when acting largely without local intervenors, state and local communities cannot rely on CRS to help with all of their polarized conflicts or to arrive in time for prevention or first official reactions or to stay for implementation, if CRS does intervene. These communities also cannot assure that their local officials will cooperate with CRS in a crisis. As a result, state and local governments will at times want to institutionalize their own collaborative dispute resolution approach to polarized conflict. Those designing the state or local intervenor office may flounder, though, in part because of how intervenors must operate in order to achieve success in the midst of polarized community conflicts, the topic of the next section.

II. THE CHALLENGES OF INTERVENING IN POLARIZED COMMUNITY CONFLICTS

The challenges posed by *institutionalizing* intervenors for polarized community conflicts stem, in part, from the challenges of *intervening* in this context. The polarized conflict intervenor's task differs markedly from that of the court mediator for a typical court case and therefore so must the ways in which these offices of intervenors are designed.

A court mediation often unfolds as follows: pursuant to an order or agreement, the parties to litigation sit at a conference table and the mediator takes them through stages of introductions, presentation of what occurred and their interests, expression of feelings about the matter, exploration of alternative resolutions, and, sometimes, settlement—usually in a matter of hours. In other words, court mediators for a typical case follow a similar structure in each case and often facilitate a scheduled event; therefore, designing an office for them is comparatively less complicated.⁶²

⁶¹ *Id.*

⁶² DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR NEUTRALS AND ADVOCATES* 95–97 (2008) (explaining the necessity for a neutral bargaining environment). *See also* JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY* (2d ed. 2013) (also offers some techniques for polarized conflicts); KIMBERLY KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 26–49 (3d ed. 2004); SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 3.2

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Intervenors in polarized community conflicts differ from court mediators in ways that increase the complexity of creating an effective public office for them. This section details what these intervenors do on a regular basis that sets them apart from typical court mediators.

A. Proactive entry

Thomas became involved in part on his own initiative. He was a Sanford official, but he assumed a new role. Other intervenors also note the importance of proactive entry.⁶³ City officials may view the conflict as a unique one—so the cumulative experience of other communities seems irrelevant.⁶⁴ The communities may also under-estimate the costs of potential conflict, and community leaders therefore might not call for intervenors. In fact, community leaders may avoid planning for unrest, even in the extreme circumstances that similar communities have encountered violence over similar conflicts. After studying communities around the world, Mary B. Anderson and Marshall Wallace concluded:

Many who live in conflict-prone areas or in areas where wars have occurred say that they could not have imagined it would happen to them. Some even claim that it is better not to acknowledge [conflict]. By acknowledging it, they say, one could make conflict more likely. . . But . . . it appears to leave them unprepared⁶⁵

In the U.S. context, former CRS intervenor Martin Walsh recalled that local leaders sometimes had a similar reaction to those just reported in

(2013-2014); *Compendium of Federal District Courts' Local ADR Rules*, THE UNITED STATES DEPARTMENT OF JUSTICE (June 17, 2014), <http://www.justice.gov/olp/adr/compendium.html> (listing rules institutionalizing dispute resolution in federal courts, which share similar approaches).

⁶³ CARPENTER & KENNEDY, *supra* note 17, at 11; see also James H. Laue, et al., *Getting to the Table in Policy Conflicts*, 20 CONFLICT RESOLUTION Q. [PREVIOUSLY MEDIATION Q.] 6 (1988); Richard A. Salem, *Community Mediation Through Outside Intervention*, 8 PEACE & CHANGE 91 (1982); John S. Murray, *Third-Party Intervention: Successful Entry for the Uninvited*, 48 ALBANY L. REV. 572 (1984); NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* 49–61 (2013).

⁶⁴ COLEMAN, *supra* note 10, at 2.

⁶⁵ MARY B. ANDERSON & MARSHALL WALLACE, *OPTING OUT OF WAR: STRATEGIES TO PREVENT VIOLENT CONFLICT* 19 (2013) (regarding communities internationally and civil violence).

communities internationally and, as a result, these local leaders impeded CRS' intervention. Walsh explained:

It is critical at those first meetings with the police chief or the mayor. They often say, "It was an isolated incident," or "It's something that we are in control of," and there is either a deliberate or a non-deliberate attempt to block and head off any further deliberations from outside. They often say, "We're handling it, we can handle it, it's really nothing major." In my mind, that's the usual mindset of authorities.⁶⁶

The antagonists in the conflict and interest groups that need to be part of any larger solution may also resist involvement, necessitating proactive work by the intervenors to engage them as well.

Proactive entry, in sum, often involves persuading local officials and many others that a particular conflict may unfold in ways that could polarize the community while failing to secure the gains they seek for that community, that may exceed their experience and training, and for which intervenors could offer the benefit of experience and skills gained elsewhere.

B. *Early intervention*

Thomas suggested contacting CRS immediately, probably moving up the time that CRS would have intervened proactively on its own accord. Moreover, local officials trusted Thomas, a circumstance that averted resistance to intervention by CRS, the issue just discussed that slows CRS work in some other settings.⁶⁷

Early intervention may have positively shaped the events that followed relatively quickly in Sanford. Thomas and CRS intervened early in Sanford, and no riots, arrests, nor violence occurred during the polarized conflict there. Perhaps riots, multiple arrests, and even violence would not have otherwise occurred in Sanford as they did in Cincinnati in 2001⁶⁸ and Los

⁶⁶ Interview by the Conflict Information Consortium with Martin Walsh, former CRS Intervenor (June 13, 2001), http://www.civilrightsmediation.org/interviews/Martin_Walsh.shtml.

⁶⁷ See Interview by the Conflict Information Consortium with Dick Salem, former CRS regional director (Mar. 14, 2000), http://www.civilrightsmediation.org/interviews/Dick_Salem.shtml (discussing resistance to the interventions by CRS conciliators).

⁶⁸ See *infra* text accompanying notes 196–99.

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Angeles in 1991-92,⁶⁹ in somewhat analogous situations. Though unique characteristics preclude attributing a causal relationship between each early intervention and the results, those studying polarized conflict more broadly identify early intervention as a constructive strategy. Experienced public policy mediators Susan L. Carpenter and W.J.D. Kennedy trace the usual trajectory:

Many conflicts start with a resolvable problem and grow beyond hope of resolution because they are not dealt with early . . . One or more parties choose not to acknowledge that a problem exists. Other groups are forced to escalate their activities to gain recognition for their concerns. Eventually everyone engages in an adversarial battle, throwing more time and money into “winning” than into solving the problem.⁷⁰

C. *Getting to the heart of the problem*

Like Thomas, other intervenors at times urge communities to define problems more broadly than public officials might be initially inclined to do, though tempered by what is feasible to achieve.⁷¹ Broadening the issues helps those involved to deal with the heart of the problem, as discussed above,⁷² not just the incident that raises public emotions. Jay Rothman, an intervenor in the aftermath of the 2001 police shooting and riots in Cincinnati, emphasized this point in the context of civil rights conflict:

Identity-based conflicts are often rooted in a history of social exclusion of social groups, usually racial and ethnic minorities, that generate a bitter legacy of resentment,

⁶⁹ See *infra* text accompanying note 142.

⁷⁰ CARPENTER & KENNEDY, *supra* note 17, at 11, 16; see also PETER T. COLEMAN, THE FIVE PERCENT: FINDING SOLUTIONS TO SEEMINGLY IMPOSSIBLE CONFLICTS 3 (2011); COLEMAN, *supra* note 10, at 11 (those studying mediation legal disputes also counsel for early mediation, but more often to reduce litigation costs and preserve continuing relationships); John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81-89 (2008); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 677-78 (2002).

⁷¹ PETER T. COLEMAN, *supra* note 70, at 45, 123-141; CARPENTER & KENNEDY, *supra* note 17, at 58-59.

⁷² See *supra* text accompanying notes 17-19.

conflict and often violence. While a new future must be forged . . . it can't be done by trying to "wall off" that past and calling for a new future based on some kind of collective amnesia of historical wrongs and grievances.⁷³

D. *Creating and tailoring a process for each conflict*

Thomas and CRS mediators facilitated creation of Sanford Pastors Connecting and arranged for that new group to provide information to those who might distrust other sources. Other intervenors recall that they invented processes to fit other volatile situations; there were, as Thomas put it, "no cookie cutter" processes because each volatile situation differed from others.⁷⁴

E. *Deciding whom to engage in the process*

Intervenors in polarized conflicts interact more than plaintiffs and defendants in cases. CRS mediators and Thomas, for example, are involved in discussions with a number of interest groups and individuals throughout the community and representatives of national groups that became active in Sanford. In fact, they dealt with group leaders even when those groups were urging racist or anti-government actions.⁷⁵ Sometimes public officials and others take issue with this approach.⁷⁶ But intervenors may respond that they must talk to those with information or influence.⁷⁷ Further, two experienced intervenors point out, "Just one party, inadvertently overlooked, may later

⁷³ Jay Rothman, *Applying Action Evaluation on a Large Scale: Cincinnati Police-Community Relations Collaborative – Successes, Failures and Lessons Learned*, in FROM IDENTITY-BASED CONFLICT TO IDENTITY-BASED COOPERATION: THE ARIA APPROACH IN THEORY AND PRACTICE 191, 204 (Jay Rothman ed., 2012); see also Jay Rothman, *Identity and Conflict: Collaboratively Addressing Police-Community Conflict in Cincinnati, Ohio*, 22 OHIO ST. J. ON DISP. RESOL. 105, 127–28 (2006).

⁷⁴ Francis E. McGovern, *Mediation of the Snake River Basin Adjudication*, 42 IDAHO L. REV. 547, 549–51 (2006); PODZIBA, *supra* note 12, at 133–35 (chart on how to design for the situation); CARPENTER & KENNEDY, *supra* note 17, at 92; GREIG & DIEHL, *supra* note 13, at 6–18.

⁷⁵ LEVINE, *supra* note 13, at 27 ("[Local authorities] resented federal officials dignifying the 'disreputable' by seeking their information and treating it with equal respect. But only in this way could the conciliator get a feeling for the phenomenon of multiple truths.").

⁷⁶ See *infra* text accompanying notes 180–83.

⁷⁷ Oral History Project, *supra* note 13 (interviews with eighteen former CRS intervenors on the topic of identifying the people to involve).

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undermine the legitimacy of the effort by publicly criticizing it as non-inclusive.”⁷⁸

Throughout, intervenors manage competing and changing decisions about whom to involve and in what ways. At times, intervenors may urge officials to limit those who are part of the process to a manageable number.⁷⁹ Intervenors might add participants as new issues arise.⁸⁰

F. Building the community's resilience in dealing with differences

Intervenors report that building relationships among polarized sectors of the local community—as Thomas and CRS mediators did by organizing Sanford Pastors Connecting and then in the police task force that would continue beyond the intervention—is crucial to helping them deal with underlying problems over time.⁸¹ “[T]he better the relationships among participants, the more they can focus their attention on substantive questions . . .,” according to Carpenter and Kennedy.⁸²

In what may be one of the strongest reasons to institutionalize intervenors at the state and local levels, intervenors emphasize that building or re-building relationships takes time.⁸³ Long-term engagement permits intervenors to establish and strengthen relationships and new identities that span groups.⁸⁴ They can then also foster creation of structures to fashion solutions to the deeper causes for the conflict over the long term.⁸⁵ For

⁷⁸ LAWRENCE SUSSKIND & JENNIFER THOMAS-LARMER, *Conducting a Conflict Assessment*, in THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 99, 105 (Lawrence Susskind et al. eds., 1999).

⁷⁹ Carpenter, *supra* note 13, at 990–96.

⁸⁰ CARPENTER & KENNEDY, *supra* note 17, at 5.

⁸¹ ROBERT D. PUTNAM & LEWIS M. FELDSTEIN, BETTER TOGETHER: RESTORING THE AMERICAN COMMUNITY 9 (2003) (“[S]ocial capital is necessarily a local phenomenon because it is defined by connections among people who know one another. Even when we talk about social capital in national and regional organization (United Parcel Service or the Texas Industrial Area Foundations, for example), we are really talking about a network or accumulation of mainly local connections.”).

⁸² Carpenter, *supra* note 12, at 61, 85.

⁸³ Melinda Smith, *The Catron County Citizens Group: A Case Study in Community Collaboration*, in THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 985, 1008 (Lawrence Susskind et al. eds., 1999).

⁸⁴ ANDERSON & WALLACE, *supra* note 65, at 25–31 (importance of developing a collective identity that was “comfortable, familiar, and natural” that surmounted in importance the reasons for the disagreement).

⁸⁵ PUTNAM & FELDSTEIN, *supra* note 81, at 9 (“One lesson is that creating robust social capital takes time and effort. For the most part, it develops through extensive and time-consuming face-to-face conversation between two individuals or among small

example, political scientists Robert D. Putnam and Lewis M. Feldstein tell of a Texas region where cleavages among Hispanic Catholics, black Protestants, suburban Jews, and others not only sowed unrest, but also prevented progress. Over time, the residents organized “Valley Interfaith” to work together for a sales tax, with thirty percent of the revenues dedicated to a joint community-building agenda, and collaborated to change political representation so that the various groups that were previously not well-represented could hold more sway in city politics.⁸⁶ As with other community relationship-building ventures, the intervention took years.

In addition to improving relationships among antagonists, the intervenors helped Sanford re-build what some scholars call “social capital,” the regular interactions and relationships that give communities resilience to new shocks and the ability to solve problems.⁸⁷ Like the commentators on building relationships in general, Putnam and Feldstein emphasize the time and effort required to build social capital:

One lesson is that creating robust social capital takes time and effort ... For the most part, the people and groups ...

groups of people...It takes person-to-person contact over time to build the trust and mutual understanding that characterize the relationships that are the basis of social capital. So we see no way that social capital can be created instantaneously or en masse.”). For a discussion of importance of relationship-building, see William R. Potapchuk & Jarle Crocker, *Implementing Consensus-Based Agreements*, in *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* 527, 544–45 (Lawrence Susskind et al. eds., 1999); PODZIBA, *supra* note 12, at 143–56.

⁸⁶ PUTNAM & FELDSTEIN, *supra* note 81, at 17, 32.

⁸⁷ PUTNAM & FELDSTEIN, *supra* note 81, at 2–3 (“As used by [these] social scientists, *social capital* refers to social networks, norms of reciprocity, mutual assistance, and trustworthiness. The central insight of this approach is that social networks have real value both for the people in those networks—hence, networking as a career strategy, for example—as well as for bystanders....Among the many different forms of social capital one distinction ...Some networks link people who are similar in crucial respects and tend to be inward-looking—bonding social capital. Others encompass different types of people and tend to be outward-looking—bridging social capital...So a pluralist democracy requires lots of bridging social capital...The problem is that bridging social capital is harder to create than bonding social capital ...”); *see also* Robert Wuthnow, *The United States: Bridging the Privileged and the Marginalized?*, in *DEMOCRACIES IN FLUX: THE EVOLUTION OF SOCIAL CAPITAL IN CONTEMPORARY SOCIETY* 59, 102 (Robert D. Putnam ed. 2002) (“At present, significant attention in the United States needs to be devoted to creating social capital that does a better job of bridging between the privileged and the marginalized.”); COLEMAN, *supra* note 10, at 21 (“[C]ommunities whose members are highly involved will have more controversies, and feelings will be more intense about the issues, but these controversies are likely to be carried on within ordinary democratic processes without degenerating into a ‘fight to the finish.’”).

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seek better schools, neighborhood improvement, better contracts with their employers, economic advantage, or some other particular good, with social capital a means to those ends and an important fringe benefit but not in itself their main aim.⁸⁸

Though community polarization was noted in as early as 1787 by the Federalists,⁸⁹ one novel aspect of the nation's current situation relates to the speed at which conflict might escalate, making the process of building resilience both more urgent and more complex. Robert Putnam and Lewis Feldstein, for example, note that a resilient community requires connections and even trust among dissimilar people (which they call "bridging social capital").⁹⁰ Unfortunately, they add, over the last few decades technology use, two-career couples, and urban sprawl, to name a few factors, have diminished involvement with community organizations, thereby cutting into people's interactions with those who hold dissimilar views and who have had different experiences.⁹¹ A recent Pew survey indicates that people are more likely now than any time during the last two decades to say that most of their friends share their political views and that the other party is a "threat to the nation's well-being."⁹² Sociologist Robert Withrow contends that marginalized groups in particular lack faith in their ability to achieve change and the resources to participate in issues advocacy, leading to fewer interactions between the privileged and marginalized residents of this nation and therefore less social capital and trust that might bridge the divides

⁸⁸ PUTNAM & FELDSTEIN, *supra* note 81, at 9–10.

⁸⁹ James Madison raised this concern in a Federalist paper, "A friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice [of factions]." MADISON, *supra* note 12 (Madison was responding to a paper by Alexander Hamilton on "domestic faction."). *See also*, THE FEDERALIST PAPER NO. 9 (Alexander Hamilton).

⁹⁰ PUTNAM & FELDSTEIN, *supra* note 81, at 2–4; *see also* COLEMAN, *supra* note 10, at 22 ("[I]f ... affiliations are confined mostly within ethnic groups, or economic strata, or religious groups, and fail to tie these groups to one another, the lines of cleavage are already set.").

⁹¹ *See supra* note 90.

⁹² *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life*, PEW RESEARCH CENTER (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> (By 2014 "[n]early two-thirds (63%) of consistent conservatives and about half (49%) of consistent liberals say most of their close friends share their political views. . . . In each party, the share with a highly negative view of the opposing party has more than doubled since 1994.").

between them.⁹³ Still, others study the negative effects on community resilience of news coverage that reinforces the audiences' views and tends to demonize those who disagree.⁹⁴ Together, these scholars' research represents a warning that people's trust of each other may be eroding. As a result, these groups may shorten discussion of their differences and more precipitously resort to tactics leading to bitterness or even violence. Cumulatively, the work by these social scientists underscores the importance of the intervenor's role in establishing groups that will continue after the intervention and in other ways fostering positive relationships within the community.

G. Bringing in new information and developing ways to disseminate it

CRS mediators brought to the Sanford conflict both their expertise in police-community relations and that of Department of Justice colleagues.⁹⁵ The need for intervenors to introduce expertise arises in other ways as well. Carol Liebman recounted a situation in which she co-facilitated discussions on a racially-charged conflict between Columbia University officials and students, some of whom were on a hunger strike and others occupying a campus building.⁹⁶ When the students began negotiations by reading a list of demands in an angry tone, the facilitators decided to teach the students how to negotiate effectively within a consensus-based process, something Liebman believed contributed to the parties reaching agreement.⁹⁷ In a fishing rights conflict involving Native American tribes, commercial fishers, and others in complex trade-offs about the types of fishing, times of fishing, geographic areas, approaches to catching the fish, and more, intervenors called in computer experts to identify options that best fit the parties'

⁹³ Wuthnow, *supra* note 87, at 101–02.

⁹⁴ MANN & ORNSTEIN, *supra* note 12, at 147–52, 181–82 (2013).

⁹⁵ *Profiles in ADR*, *supra* note 30, at 42; McMorris-Santoro, *supra* note 6 (“[The Sanford Mayor] said federal officials arrived with experience on how to handle large crowds and engage with protest movements. They had tips on police tactics, too ‘These guys [Justice Department advisers] have been there, done it, they’re very astute,’ Triplett said. ‘We on the city side, we fix roads. We make sure your lights turn off and on. We make sure your toilets flush. We cut ribbons for new businesses. So you’ve got to rely on those that know.’”).

⁹⁶ Carol B. Liebman, *Mediation as Parallel Seminars: Lessons from the Student Takeover of Columbia University’s Hamilton Hall*, in *STORIES MEDIATORS TELL* 245, 245–48 (Eric R. Galton & Lela P. Love eds., 2012) (the mediation occurred in 1996).

⁹⁷ *Id.* at 254, 271–72. See also COLEMAN, *supra* note 10, at 13, 24–25 (importance of teaching about role of the media); U.S. DEP’T OF JUSTICE (2014) <http://www.justice.gov/crs/what-we-do/training> (describes CRS training programs).

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interests.⁹⁸ In addition, intervenors retain experts on technology to educate the public, conduct surveys, and analyze information.⁹⁹ In these and other ways, intervenors teach and orchestrate experts in addition to their facilitative roles.

H. *Responding to new issues over a substantial period*

With Thomas' guidance, Sanford remained engaged long enough to implement a structure for broad resident involvement with the police department and other municipal services. Implementation represents only one reason for sustained involvement, however; experienced intervenors note that a political change can also derail a consensus plan unless the intervenor stays involved.¹⁰⁰ "Parachuting in" and leaving quickly may result in few lasting changes relating to the causes of the conflict and, as a result, the conflicts re-emerge.¹⁰¹

I. *Working ahead of polarized conflict*

Even experts dismay at predicting whether "any given conflict will degenerate to intractability."¹⁰² Recognizing this issue, CRS does research to identify communities at risk of strife and, as resources permit, interacts with them in advance to deal with concerns (in addition to building relationships as discussed immediately above).¹⁰³

⁹⁸ Frances McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 52 U. CHI. L. REV. 440, 460–66 (1986). See also Carpenter, 1999, *supra* note 13, at 61, 84–85 (process and options); CARPENTER & KENNEDY, *supra* note 17, at 9–10, 124–127 (options).

⁹⁹ Connie P. Ozawa, *Making the Best Use of Technology*, in THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 401, 407–08, 418–25 (Lawrence Susskind et al. eds., 1999).

¹⁰⁰ Potapchuk & Crocker, *supra* note 85, at 551–52; CARPENTER & KENNEDY, *supra* note 17, at 151–54.

¹⁰¹ Rothman (2012), *supra* note 73, at 191, 199–200; David Matz, *Parachuting In*, 19(2) DISP. RESOL. MAG. 20, 21 (2013).

¹⁰² COLEMAN, *supra* note 70, at 5.

¹⁰³ LEVINE, *supra* note 13, at 105 n. 5 (The U.S. reflects its confidence that readiness is important as it funds intervenors in other nations that have experienced recent internal violence.); Craig Zelizer, *The Business of Peacebuilding*, in INTEGRATED PEACEBUILDING: INNOVATIVE APPROACHES TO TRANSFORMING CONFLICT 31, 37–39 (Craig Zelizer ed., 2013) (reporting that a portion of USAID funding is to work on conflict—about \$26 million in operating and grants for conflict and peacebuilding reported in 2010 plus \$55 million for "transitions initiatives" plus contributions through the United Nations for non-military peacebuilding initiatives).

Sanford is not the only community in which a local intervenor worked in advance of the incident that provoked demonstrations. Elsewhere, a local community mediation organization has played the intervenor role for a time, or a respected private resident has done so.¹⁰⁴ Still, in many instances the CRS does not arrive and no experienced intervenor steps forward who can gain the ear of the interest groups or government officials early, before the disputing groups become polarized.¹⁰⁵ As two scholars note about this issue on an international basis, “First ... many conflicts remain unmediated as present arrangements rely on volunteers to recognize that a problem exists and then take appropriate action to intervene Second, [without establishing the intervenors in advance, one can]not necessarily ensure that the right mediators with proper training are matched with the conflict at hand.”¹⁰⁶

J. Putting it together

A picture of effective intervenors in a polarized conflict emerges from the Sanford example and the collective views of experienced intervenors and scholars. In this picture, intervenors are watching and ready, looking for moments in which they might engage antagonistic parties and others who might help them to collaborate on ways to avoid violence and solve underlying problems. They build their skills through extensive experience and analysis. They know and draw on experts. The effective intervenors act proactively, creatively, quickly, honestly, flexibly, personably, and with broader public values in mind when they enter complex and volatile situations.

To put it another way, intervenors cannot be risk-averse or tied to their desks. They cannot wait weeks for permission. They cannot use the same template each time. They cannot merely be sent to a training and then deemed ready. They cannot be required to handle 20 cases a week. They need to be available but, as with Andrew Thomas in Sanford, Florida, they may not be needed full-time to intervene. In short, institutionalizing access to intervenors is a tall order.

The next section turns to that challenge—to create an institutionalized state and local version of what Thomas provided.

¹⁰⁴ PODZIBA, *supra*, note 12, at 75–76.

¹⁰⁵ Joseph B. Stulberg, *Tony*, in *STORIES MEDIATORS TELL* 309, 320 (Eric R. Galton & Lela P. Love eds., 2012) (The case discussed “reaffirms the significance of having an independent, proactive community-based dispute resolution resource available to its citizens.”).

¹⁰⁶ GREIG & DIEHL, *supra* note 13, at 174.

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III. THREE QUESTIONS TO GUIDE THE CREATION (OR RE-CREATION) OF PUBLIC OFFICES OF INTERVENORS AT THE STATE AND LOCAL LEVEL

State and local governments have created offices for intervenors for polarized community conflicts in a number of public agencies (a term used here for simplicity).¹⁰⁷ Intervenors have been placed within the governor's office,¹⁰⁸ civil rights/equal opportunity agencies,¹⁰⁹ executive branch agencies,¹¹⁰ a free-standing state agency with a governing board appointed by officials from all three branches of government,¹¹¹ community mediation centers,¹¹² courts,¹¹³ and universities.¹¹⁴ The choice may follow careful

¹⁰⁷ CHRIS CARLSON, SOLUTIONS TO ESTABLISHING SOUND GOVERNMENT DR PRACTICES, EXECUTIVE ORDERS: HOW GOVERNORS CAN PROMOTE COLLABORATIVE PROCESSES AND DISPUTE RESOLUTION FOR MORE EFFECTIVE GOVERNANCE 8 (2000); Policy Consensus Initiatives Working Group, *Report on Barriers to the Use of ADR in States and Approaches for Overcoming Them II*, THE KITCHEN TABLE DEMOCRACY (last visited Sep. 24, 2015), http://www.policyconsensus.org/publications/reports/state_adr_barriers.html.

¹⁰⁸ Howard S. Bellman & William R. Drake, *New Negotiating Tools for Governors*, THE KITCHEN TABLE DEMOCRACY (last visited Sep. 24, 2015), http://www.policyconsensus.org/publications/reports/negotiating_governors.html; Mario M. Cuomo, *Governing as an ADR Process*, THE KITCHEN TABLE DEMOCRACY (last visited Sep. 24, 2015), http://www.policyconsensus.org/publications/reports/governing_adr_process.html.

¹⁰⁹ FLORIDA COMMISSION ON HUMAN RELATIONS, <http://fchr.state.fl.us> (historically).

¹¹⁰ See, e.g., Jonathan W. Reitman, *The Allagash: A Case Study of a Successful Mediation*, MEDIATE.COM (June, 2003), <http://www.mediate.com/articles/reitmanJ.cfm>; William R. Drake, *Statewide Offices of Mediation*, 5 NEGOT. J. 359, 361–62 (1989) (noting three state-level offices dealing with public disputes within the executive branch); Lawrence Susskind, *Experiments in Statewide Offices of Mediation*, in STATEWIDE OFFICES OF MEDIATION: EXPERIMENTS IN PUBLIC POLICY 3 (1987).

¹¹¹ The Ohio Commission on Dispute Resolution and Conflict Management, appointed by representatives of the three branches of Ohio government, intervened in some public conflicts, beginning in the 1990s. OHIO REV. CODE § 179.01. However, the Ohio General Assembly repealed the Commission's authorization in 2011. Ohio Am. Sub. H.B. 153 (2011).

¹¹² See story of the New Mexico mediation, *infra* text accompanying notes 228–35.

¹¹³ See story of the court-supervised interventions *infra* text accompanying notes 196–99, 201–07; Drake, *supra* note 110, at 361–62 (noting Hawaii Supreme Court program).

¹¹⁴ Stephan Sonnenberg & James L. Cavallaro, *Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Skills to Human Rights*, 29 WASH. U. J. OF LAW & POL'Y 257, 301 (2012) (law school based clinics in human rights issues); William D. Ruckelshaus, *From Conflict to Collaboration: Restoring Trust in Government*, KITCHEN

study,¹¹⁵ or, instead, may occur due to the happenstance that an agency's leader is willing to establish an intervenor role.¹¹⁶ Political considerations—yet another explanation for the site chosen—may explain why Congress initially placed CRS in the Commerce Department.¹¹⁷ A reporter wrote in 1964—when civil rights issues divided Congress—that placing CRS in an agency headed by the former Governor of a Southern state was designed to increase CRS's acceptability to Southern leaders.¹¹⁸

Planners have established offices of intervenors at various levels of government. Sanford's Thomas worked at the local level, for example, while Maryland's MACRO, discussed later, is a state entity.¹¹⁹ As with the choice of public agency, the level of government may depend on political realities and on whether intervenors will have enough to do at each level, given the scale and types of conflict.

In addition to differences in the government agency and the levels of government that house the office of intervenors, the office itself may vary in size. Sanford, Florida illustrates how a small community can institutionalize an intervention capacity by employing an intervenor who performs other functions when not needed to intervene.

The three questions in this section respond to the frequent need to design a new office of intervenors. Intermittent funding requires re-establishing intervention functions in these or other offices from time to time, regardless of the size, selected public agency, or level of government.¹²⁰ Sometimes the

TABLE DEMOCRACY (May 1997), http://www.policyconsensus.org/publications/reports/conflict_collaboration.html (university-based interventions in environmental issues).

¹¹⁵ GOVERNOR'S COMMISSION ON DISPUTE RESOLUTION AND CONFLICT MANAGEMENT, MOVING FROM CONFLICT TO COOPERATION (1990) (The legislation creating the Ohio Commission on Dispute Resolution and Conflict Resolution in the 1990s followed a multi-year study by the Governor's Commission on Peace and Conflict Management. The Commission recommended statutory creation of the Ohio Dispute Resolution and Conflict Management Commission. This was done through enactment of OHIO REV. CODE § 179.01, repealed in Ohio Am. Sub. H.B. 153 (2011)).

¹¹⁶ CARLSON, *supra* note 107, at 8.

¹¹⁷ 42 U.S.C.S § 2000g (2015) (In 1966 the President and Congress moved CRS to the Justice Department. Reorganization Plan No. 1 of 1966, 31 F.R. 6187, 80 Stat. 1607 (1966)).

¹¹⁸ Cabell Phillips, *Johnson Pleads for Compliance, But Vows Rights Enforcement*, N.Y. TIMES (July 3, 1964), http://www.nytimes.com/1964/07/03/johnson-pleads-for-compliance-but-vows-rights-enforcement.html?_r=0, quoted in LEVINE, *supra* note 13, at 12.

¹¹⁹ See *supra* text accompanying notes 26–34, 145–52.

¹²⁰ Chris Carlson & Heather Anderson, *Dispute Resolution in the Public Sector: What Makes Programs Survive, Thrive, or Die?*, 20 DISP. RESOL. MAG., no. 3, Spring 2014, at 11, 12, 16; Drake, *supra* note 110, at 359, 364 n. 5 (noting state-level dispute

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public agency itself disappears, while at other times the public agency cuts the resources devoted to intervening in polarized conflicts.¹²¹ For example, community mediation centers can become proactive intervenors in polarized conflicts, but face difficulty in maintaining funding to do so,¹²² and have often closed or re-focused on activities such as training that created another income stream.¹²³ Those designing localized offices of intervenors should ask and answer these three questions because of the special hurdles that intervenors in polarized conflict encounter regardless of their size, the agencies that manage their interventions, or the level of government where the offices reside:

A. Question One: Will public officials make the key decisions (e.g., Should we intervene? When? Should we ask stakeholders to discuss the immediate crisis only or also the underlying concerns that led to the crises?) and do so with input from experienced intervenors who understand the context and conflict (e.g., Would collaborative dispute resolution methods succeed in this setting)?

Issues both of feasibility and policy underlie decisions regarding *whether* the public should fund any particular intervention, *how deeply* the intervenor should press regarding the causes of the conflict, and *when* the intervention should occur.¹²⁴ To complicate the task, sometimes an effective intervention

resolution offices that began and ended in the executive branch and discussing new ones, most of which now no longer exist).

¹²¹ CARLSON, *supra* note 107, at 8 (state agencies struggle to get resources for state offices to manage consensus building); Policy Consensus Initiatives Working Group, *supra* note 107; Jill Purdy, *An Overview of State Dispute Resolution Programs*, THE KITCHEN TABLE DEMOCRACY (July 1998), http://www.policyconsensus.org/publications/reports/state_dr_programs_overview.html (of 28 state programs, 15 in courts, 7 in universities, and 6 in executive branch; state support funded only 25% to 85% of the total budget and some had no state funds).

¹²² Terry Amsler, *Community Dispute Resolution: Assessing Its Importance and Addressing Its Challenges: An Introduction to the Community Dispute Resolution Issue*, 19 DISP. RESOL. MAG., no. 2, Winter 2013, at 4, 6; Wendy E. Hollingshead Corbett & Justin R. Corbett, *Community Mediation in Economic Crisis: The Reemergence of Precarious Sustainability*, 11 NEV. L.J. 458, 459 (2011).

¹²³ Doug Van Epps, *Public Funding of Community Dispute Resolution Centers*, 19 DISP. RESOL. MAG., no. 2, Winter 2013, at 7, 10.

¹²⁴ Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747, 755 (2010) (referencing conflict pitting religious rights and gay rights; continuum of public and private concerns); GREIG & DIEHL, *supra* note 13, at 13–14 (importance of reflecting the public priorities in terms of when to intervene in the international context).

must operate alongside an attempt to achieve political change – in order for either to work.¹²⁵ Conflict specialist Craig Zelizer has noted this tendency in examining interventions conducted in other nations: “Over the past fifteen years it has become abundantly clear that development work cannot advance without addressing the underlying dynamics of violence, while peace-building is not effective without addressing the basic needs of people through economic opportunity, basic health services, and a functioning legal system.”¹²⁶ To take these considerations into account, those making decisions about interventions need to be (a) in touch with the public interests and the initiatives of others in government or elsewhere and (b) in discussions with experienced intervenors with knowledge about the pertinent conflict and context.

Listing what commentators contend should be weighed by decisionmakers in each polarized conflict serves to underscore the importance of having a public official making the decision but with input from an experienced intervenor with knowledge about what is happening on the local level. On the potentially positive side of intervention, commentators suggest examining whether an intervention will:

- Avert violence (e.g., those on both sides of the abortion issue agree on efforts to reduce the likelihood of violence between their groups though they continue to disagree vehemently on whether abortion should be legal);¹²⁷
- Help people understand the views of people on “the other side”;¹²⁸
- Set “a tone of rationality, openness and the need for decision which made it possible for factions to negotiate differences”;¹²⁹

¹²⁵ See U.S. Dep’t of Justice Cmty. Relations Serv., *Avoiding Racial Conflict: A Guide for Municipalities*, <http://www.justice.gov/archive/crs/pubs/avoidracial.htm> (last visited Sep. 24, 2015) (abstract notes importance of the right laws, human relations commissions, fair housing, voting rights); U.S. Dep’t of Justice Cmty. Relations Serv., *Principles of Good Policing: Avoiding Violence Between Police and Citizens*, <http://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf> (last revised Sept. 2003).

¹²⁶ Zelizer, *supra* note 17, at xi–xii.

¹²⁷ PODZIBA, *supra* note 12, at 13–14. This goal is explicitly listed in the legislation creating CRS. 42 U.S.C.S § 2000g-1 (2015).

¹²⁸ LEVINE, *supra* note 13, at 242 (peer review of the Natchez, Mississippi intervention); Smith, *supra* note 83, at 1003–04, 1007; Susan L. Podziba, *Civic Fusion: Moving from Certainty through Not Knowing to Curiosity*, 30 NEGOTIATION J. 243, 243 (2014) (“[B]ringing people close together under conditions that enable them to bond, even as their polarizing beliefs remain intact.”).

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- Reach a widely-embraced solution (e.g., setting a place for those seeking odd jobs to gather that was safe for the workers and traffic and acceptable to neighborhood businesses);¹³⁰
- Broker communications that ultimately might lead to inclusive political organizations that could address the roots of the conflict through political or social change;¹³¹ and
- Cost the public less than the costs (broadly speaking) to the community of continuing conflict.¹³²

Against these positives, those deciding whether, how, and when to intervene might weigh the risk that the intervention will:

- Not do enough good to be worth the public expenditures and investment of persons in the community¹³³ and
- Reduce pressure for change (without brokering communications that can lead to change) and thereby increase the chances that the polarized community will ignore the need to consider change.¹³⁴

CRS provides one workable model for combining policy and practice in decision-making. CRS is structured to give public officials the input of experienced intervenors when they decide whether and how to intervene. The Civil Rights Act of 1964 provides for Presidential nomination and Senate confirmation of the CRS director and requires annual reports to Congress, making the director responsive to the public policies of the nation.¹³⁵ Congress also asked CRS to notify the pertinent Congressional committee each time it deploys staff to intervene.¹³⁶ Those who make the initial and

¹²⁹ LEVINE, *supra* note 13, at 242 (peer review of the Natchez, Mississippi intervention). *See generally* THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind et al. eds., 1999) (distilling lessons about what occurred and was achieved from a series of case studies); PUTNAM & FELDSTEIN, *supra* note 81, at 17, 32.

¹³⁰ Lela P. Love, *Glen Cove*, in *STORIES MEDIATORS TELL* 331, 331–33 (Eric R. Galton & Lela P. Love eds., 2012); LEVINE, *supra* note 13, at 242.

¹³¹ PUTNAM & FELDSTEIN, *supra* note 81, at 17; LEVINE, *supra* note 13, at 242.

¹³² ANDERSON & WALLACE, *supra* note 65, at 18–25; CARPENTER & KENNEDY, *supra* note 17, at 3–4.

¹³³ SUSSKIND & THOMAS-LARMER, *supra* note 78, at 102–05.

¹³⁴ *See, e.g.*, Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 24 (1993).

¹³⁵ 42 U.S.C.S §§ 2000g; 2000g-3 (2015).

¹³⁶ 2013 CRS ANNUAL REPORT, *supra* note 9, at 7.

ongoing decisions regarding CRS interventions are both experienced intervenors in polarized conflicts, and public officials responsible to the U.S. Attorney General on the general strategy, including consistency with the Department's policies on civil rights policies and justice.¹³⁷ For example, Richard A. Salem, a former head of a CRS regional office, recalled the intertwined public policy and strategy questions involved in just the decision regarding *whether* to intervene:

Okay, number one was potential for violence. Assuming it's within our jurisdiction, the mandate of the agency. Number two, is it likely we can have some impact? How many people are involved? Another is, who's asking us? Is it a school superintendent, is it the head of the NAACP, is it a congressman's office, is it the director calling from Washington? This all had a practical impact on whether we responded or not. That had an impact on how effective we could be. It had an impact on how important the matter was, and the political consequence to the agency of responding or not responding, which obviously is a matter that you had to take into consideration. That wasn't overriding, but it could have some impact. How long had the problem been persisting? Have we ever been in that matter before? What other efforts had been undertaken? Was this intractable, or was this something that was new and fresh? Was this something we had experience in? Do we have a higher expectation of success based on our experience? Did we have the money to respond? Did we have the personnel to respond? What were the negatives? Was there someone who didn't want us to respond? Maybe there was a good reason not to. That might not be pretty always, but there well may be a reason why we should not respond.¹³⁸

Policy and feasibility also affect decisions on the *shape* of the intervention.¹³⁹ If a specific incident sparks increased polarization and unrest, should the intervenor address just that incident? To take such a limited approach, commentators charge, intervenors could remove pressure to

¹³⁷ LEVINE, *supra* note 13, at 25–29 (describing the decision-making in action).

¹³⁸ Oral History Project, *supra* note 13: *Dick Salem* (2000).

¹³⁹ James L. Laue & Gerald W. Cormick, *The Ethics of Social Intervention*, in *THE ETHICS OF SOCIAL INTERVENTION* 205, 228–31 (Gordon Bermant et al. eds., 1974).

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change the status quo without helping those involved to achieve change.¹⁴⁰ To examine the root causes, by contrast, might facilitate change with long-term benefits but it would take more time and resources.¹⁴¹ Former CRS Mediator Silke Hansen explained why CRS mediators who weigh strategy and policy should not define their intervention goals too narrowly:

[I]n racial conflicts, there are two taproots growing simultaneously. One is a perception or belief of unfair treatment or discrimination. The other is a lack of confidence in any redress system. There is the belief that, "Even if I

¹⁴⁰ Nader, *supra* note 134, at 24 ("The drum beat [toward informal resolution of disputes] serves as a battering ram to reduce the rights of victims in order to sue perpetrators of harm and to pacify the public at large."); Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 54 (2009) ("I suggest further that to the extent projects of [dispute system design] are unfolding against a backdrop of neoliberal ideas and practices, this structural similarity stands to strengthen some of these ideas and practices, and with them attendant forms of social inequality."). Commentators sometimes view the trade-offs as between settling and litigation, but litigation often cannot resolve polarized conflicts, so the alternative to a successful intervention becomes more efforts to assert power, such as publicity, unrest, and even violence. See, e.g., Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1277 (2009) (referring litigation as alternative to settlement).

¹⁴¹ Cf. Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 43 (2007) (In the intra-institution context, noting, "This methodology structures inquiry about the nature of a problem and its relationship to intervention strategies by continually prompting a series of questions about the appropriate scope and goal of an intervention: What kind of problem is this? Why is it considered a problem and by whom? How does it relate to other problems you have seen? What is causing this problem? What would it take to remedy it here and for others? What can be done about it now and in the future? The conflict resolver continually probes whether the questions as posed locate the problem at the level where it can be meaningfully addressed."); Cohen, *supra* note 140, at 76 (Cohen suggests the following questions to get at the broader scale implications: "What are the potential distributional effects of configuring a dispute at one level of jurisdiction or geography versus another, for example, as a dispute within a particular bounded locality (the city) or, conversely, as one that implicates the state and its ability to devolve or retain the power to regulate private and public space through zoning, taxation, and eminent domain? How do these alternative ways of configuring the jurisdictional boundaries of a dispute inform an individual's or a collective's understandings and experiences of being a stakeholder? Do background social norms and expectations make particular harms perceptible as conflict and do they produce particular kinds of interests and negotiation strategies? Would negotiated agreements look different if legal frameworks, jurisdictional configurations, and social expectations were the sustained objects of change? If so, when/how should designers try to weave the conditions shaping conflicts and shaping parties into the very fabric of DSD?").

complain, it is not going to make a difference.”... If people who feel they are facing despair had an effective redress system, you wouldn't get that tension. If you didn't have a perception of disparity in the first place, you wouldn't need that redress system... I think one of the mistakes that we often make in responding to that is that all we look at is the triggering incident. We try to resolve the triggering incident, and we totally miss all of the pieces of those two fuses... But the fuses are still there, so unless they are dealt with, they are going to regroup after a while, even when people don't even remember the triggering incident anymore... With the Rodney King situation [in Los Angeles in 1991-1992], if you remember the disturbances... those events occurred not when Rodney King was beaten [by police and recorded on videotape], even though you would think that the beating would have generated anger. But rather, the incidents occurred when the redress system didn't work. When the police officers were found “not guilty,” that is when all hell broke loose. The anger was about much more than the Rodney King incident, it was about these two fuses that had been growing.¹⁴²

The *timing* of the intervention also implicates both policy and practice. Former CRS intervenor Nancy Ferrell put it this way: “I wouldn't try to stop a protest. The protest is what really gets the establishment's attention and gives me an opportunity to say, ‘So what happens next?’”¹⁴³ Wallace Warfield, also once a CRS intervenor, added a nuance about timing:

[T]he question would be balancing out what the demonstrators needed to do to present a forceful portrait of the issue they were dealing with against the city's wishes to end the demonstration entirely... So the city would say, “This demonstration has got to end. If it doesn't end, we're going to enforce a temporary restraining order,” which means calling the police in and the possibility of violence. And so you'd have to negotiate that... That was... a matter of some skill... to work with both sides to allow for the symbolic aspect of the demonstration..., without

¹⁴² Oral History Project, *supra* note 13: *Silke Hansen* (1999).

¹⁴³ Oral History Project, *supra* note 13: *Nancy Farrell* (1999).

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compromising ...not only what they were doing, but the implications for negotiations later on.¹⁴⁴

The Sanford story represents a model similar to CRS in joining strategy and policy at the local level. In Sanford, federal and local officials decided to become involved in improving communications and to open the discussions to broader questions of racial justice, informed by experienced intervenors regarding Sanford's fraught civil rights history and what they could accomplish, given limited resources. The City Manager and Andrew Thomas also discussed issues in an ongoing way, and the arrangement worked, perhaps because of their personal relationships.

How might a local or state agency achieve this joint policy/strategy decision-making if the need does not justify funding an ongoing staff of intervenors? One answer is the Sanford one—an intervenor with other flexible job responsibilities. Another is to use contract intervenors. As Question One emphasizes, it will be important that the public officials and any contract intervenors stay in regular contact. For situations like this, the next story, told through the eyes of two court administrators,¹⁴⁵ illustrates how a state supreme court can interact before contracting and then structure the contract to keep public officials involved to shape the intervention, informed by experts on the ground.

The irritations between the 9,000 residents of Frostburg Maryland and the students at Frostburg State University had taken on racial overtones by 2011. The student body had become more racially diverse over the previous decade, and African-American students reported that town residents, who were predominately white, made them feel like outsiders. When two African-American students were murdered, one in 2010 and another in 2011, in each case by another African-American student, some town residents raised concerns that the University was "importing" urban violence. Students responded with outcries about racism on the part of the town, and the news media throughout the state covered their concerns.

An arm of the state's highest court, the Maryland Court of Appeals, awarded a grant to initiate intervention in this conflict. In 2000, the court had created an office of dispute resolution experts, and Chief Judge Robert M. Bell, along with members of an ADR commission he had established, charged the new office (called the Mediation and Conflict Resolution Office

¹⁴⁴ Oral History Project, *supra* note 13: Wallace Warfield (2000).

¹⁴⁵ Phone interview with Rachel Wohl and Lou Gieszl, Director and Deputy Director of the Maryland, on December 17, 2013, and January 14, 2014, and emails from Wohl to the author on March 18, 2014, and from Gieszl to the author on March 24, 2014.

or “MACRO”) not only to encourage the use of mediation for cases within the jurisdiction of Maryland courts but also to “promote more peaceful and civil communities” and “substantially improve the way that we, as a society, manage conflict.”¹⁴⁶ Thus, encouraging appropriate people to apply for grants that would pay for intervenors in a communitywide conflict fell within the goals set by the court for MACRO. Chief Judge Bell delegated to MACRO’s director and deputy director, Rachel Wohl and Lou Gieszl, and their Grant Review Committee, the authority to make appropriate decisions about when and to whom to award grants to bring in intervenors, without his involvement in the details. Wohl and Gieszl prioritized the Frostburg conflict for intervention because of its importance to a sense of racial injustice by residents throughout the state. They also saw the possibility of lessons learned that could help in other “town-gown” disputes.

They recognized, though, the importance of securing local expertise about the feasibility of achieving their goals through a collaborative dispute resolution-based intervention. As one means of facilitating situations like this one, MACRO has a “fellows program” that gives classes to selected public officials on just these topics, and a Frostburg State University vice president happened to be one of their fellows who had taken these classes. The vice president worked with a professor who could make an assessment of the feasibility, how the issues should be framed, and who should be involved as participants.

MACRO Deputy Director Gieszl advised that the grant proposal should contemplate use of an intervenor from outside the university with previous experience in helping in such conflicts.¹⁴⁷ MACRO funded the grant proposal ultimately submitted by the professor—to provide facilitated dialogue between stakeholders in the town and university for two years, allowing independence for that initiative to operate, and asking that the university bear some of the expenses for the project. That dialogue is now ongoing, with intermittent discussions between University and Court officials on its shape.

In the Maryland MACRO contracting process, the public officials making the decisions about the intervention had expertise in intervening and

¹⁴⁶ JOIN THE RESOLUTION: THE MARYLAND ADR COMMISSION’S PRACTICAL ACTION PLAN 2 (1999); Deborah Thompson Eisenberg et al., *Alternative Dispute Resolution and Public Confidence in the Judiciary: Chief Judge Bell’s “Culture of Conflict Resolution”*, 72 MD. L. REV. 1112, 1122 (2013).

¹⁴⁷ Gieszl noted some individuals who would meet these criteria. Phone interview with Rachel Wohl and Lou Gieszl, Director and Deputy Director of the Maryland, on December 17, 2013, and January 14, 2014, and emails from Wohl to the author on March 18, 2014, and from Gieszl to the author on March 24, 2014.

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could weigh competing public policy concerns. They also had input from those knowledgeable about what would be feasible in Frostburg. The public officials could locate experienced and talented intervenors—something that makes the contracting out process viable. Their approach mirrors a strategy suggested by a blue ribbon commission of public officials and private mediators—that public officials should first ask for an “assessment” by experienced intervenors as to whether intervention in a public conflict makes sense and then fund an intervenor who had some level of independence from appointing public officials, but reporting in to secure agreement on any needed modifications.¹⁴⁸

Both this recommended approach and the approach used for Frostburg University unfold slowly, precluding the early proactive intervention discussed in connection with Sanford.¹⁴⁹ To deal with the time-consuming processes of awarding grants, MACRO has a mediator on retainer who can enter a volatile situation quickly, giving MACRO time to use the assessment and contract approach for the long term.¹⁵⁰ The contracting out process also does not easily lead to the preventive work in advance of a triggering incident,¹⁵¹ though MACRO’s fellow program might help to stimulate preventive work by local officials.

Returning to Question One, CRS, Sanford, and the Maryland story illustrate two responses—a staff model and a contract model. Both options combine policy and strategy considerations. Additional responses may be appropriate in other contexts. Though responses will vary, Question One should be asked and answered whenever state and local governments institutionalize interventions into polarized conflicts. The risks of not doing so include not only wasting public resources, but also removing the force behind legitimate winds of change.

B. Question Two: Will the public agency maintain a productive institutional climate and culture for the interventions while being accountable for the public funds?

¹⁴⁸ SOC’Y FOR PROF’LS IN DISP. RESOL., BEST PRACTICES FOR GOVERNMENT AGENCIES: GUIDELINES FOR USING COLLABORATIVE AGREEMENT-SEEKING PROCESSES (1997) (Recommendations 4, 5, and 8) (This organization is now called the Association for Conflict Resolution). *See also* SUSSKIND & THOMAS-LARMER, *supra* note 78, at 105 (discussing importance of assessment for other reasons as well).

¹⁴⁹ *See infra* text accompanying notes 26–34; 63–66.

¹⁵⁰ Phone interview with Rachel Wohl and Lou Gieszl, Director and Deputy Director of the Maryland, on December 17, 2013, and January 14, 2014, and emails to the author dated March 18, 2014, and March 24, 2014.

¹⁵¹ *See infra* text accompanying notes 102–06.

Another challenge for those designing offices of intervenors is to create a climate and culture¹⁵² (colloquially the way “things are done” within that office)¹⁵³ to foster the use of effective approaches such as those already discussed in Part II, while remaining accountable in ways valued by the office’s funders.

1. *Climate and Culture*

Intervenors need a supportive institutional climate and culture to act, as discussed above,¹⁵⁴ proactively, creatively, quickly, honestly, flexibly, and personably. That climate and culture should also support their efforts to improve their skills and understanding of the broader public interests that were the focus of Question One.

Climate and culture issues have plagued even those institutionalizing mediation for cases in litigation, though, suggesting that this will be a high hurdle for administrators to clear. Former U.S. Court of Appeals mediator Robert Rack noted the difficulties of encouraging quality mediation for court cases within “a highly structured, traditional, rule-bound institution.”¹⁵⁵ Rack juxtaposed the court’s climate with his desired climate for mediation this way:

Court: “We are the court, the authority; we make the rules, issue orders, dispense justice and make decisions; litigants come to us because they must, and we impose the structure and procedures to which they are required to adhere.”

Mediators: “We [keep] our focus on the litigants as customers, trying to identify their needs and wants and trying to meet them. Litigants come to the court to get the best possible outcomes to intractable problems, and we help them achieve their goals.”¹⁵⁶

¹⁵² FRANK J. LANDY & JEFFREY M. CONTE, WORK IN THE 21ST CENTURY: AN INTRODUCTION TO INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY 564 (2004) (“Culture is often associated with the more cognitive variables such as beliefs and values, and climate is more commonly associated with more affective states such as feeling.”).

¹⁵³ BRIAN J. OSTROM ET AL., TRIAL COURTS AS ORGANIZATIONS 5 (2007).

¹⁵⁴ See *supra* section II.

¹⁵⁵ Robert Rack, *A Letter to My Successor*, 26 OHIO ST. J. ON DISP. RESOL. 429, 431 (2011).

¹⁵⁶ *Id.* at 430.

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In addition to the court's influence, lawyers may also influence climate and culture for court mediators. In some contexts, commentators contend that lawyers narrow the focus of court mediation to disputed legal issues, dashing hopes on the part of some mediation organizers that mediators would guide parties to discuss any disputed issues, including non-legal ones.¹⁵⁷ Regarding court and lawyer influence, researcher Julie Macfarlane observed that "there is evidence of ... 'convergence,' where two different structural and cultural systems have moved closer together to produce a new form that borrows characteristics of each."¹⁵⁸ This means that mediators may not accomplish the issue-broadening or reconciling goals that some had sought.¹⁵⁹ Although the analogy is not perfect, these reports on court-connected mediation represent cautionary tales for those trying to encourage an appropriate climate and culture for intervening in polarized conflicts.

To nourish appropriate climates and cultures for intervenors in polarized conflicts, one might examine the levers that administrators more broadly can adjust to create their desired climate and culture. Those studying organizations identify the following key levers that can affect the way things are done:

- what is valued, the norms and expectations,
- the leadership style,
- the communication patterns,
- the procedures and routines,

¹⁵⁷ Jacqueline Nolan-Haley, *Mediation: The "New" Arbitration?*, 17 HARV. NEGOT. L. REV. 61, 74–75 (2012); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 879–80 (1997); John M. Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 121–23 (2002); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is? "The Problem" in Court-Connected Mediation*, 15 GEO. MASON L. REV. 863, 874–77 (2008); Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 446 (2007); Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 25 (2001). But see Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 277–79 (2002) (lawyers' effect on the process varies). For different results in domestic relations mediation, see Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1319, 1392–94 (1995). See generally, 1 COLE ET AL., *supra* note 63, § 14:11.

¹⁵⁸ Julie Macfarlane, *ADR and the Courts: Renewing Our Commitment to Innovation*, 95 MARQ. L. REV. 927, 931 (2012).

¹⁵⁹ Nolan-Haley, *supra* note 157, at 74–5; Carlson & Anderson, *supra* note 120, at 14–16.

- the definition of success,¹⁶⁰
- the personality traits of those hired,¹⁶¹
- what people know about the organization's history,¹⁶² and
- the organizational structure.¹⁶³

For example, to encourage intervenors to prioritize their time in ways that fit the office's goals, the leader could encourage ongoing discussions about what that office values, reinforcing these points through awards for particular achievements and recounting stories of intervenors acting consistently with the office values. These values could also become the supervisor's announced expectations that would guide compensation and promotion decisions. The office could encourage attendance at professional meetings with CRS or other intervenors who share the office values. The office of intervenors could elicit feedback from those involved in the interventions on pivotal points, such as whether the interventions were helpful in reducing polarization or dealing with the underlying causes of conflict, though being careful to maintain the confidentiality intervenors had promised.¹⁶⁴ To encourage the independent thinking needed to act quickly and flexibly, the administrators could adjust the procedures and routines so that intervenors could act of their own accord initially while staying in touch with supervisors to shape ongoing decisions.

When the office of intervenors is a sub-unit of a larger agency, administrators may have already used these levers to encourage the best climate and culture for the larger organization, but failed to modify them as needed to optimize the work of the sub-unit that intervenes in polarized conflicts.¹⁶⁵ Intervenors will probably not enter polarized conflicts expeditiously and flexibly if the larger public agency that houses them—think of a court or administration agency—rewards the intervenors for the

¹⁶⁰ OSTROM ET AL., *supra* note 153, at 5.

¹⁶¹ LANDY & CONTE, *supra* note 152, at 422; RONALD E. RIGGIO, INTRODUCTION TO INDUSTRIAL/ORGANIZATIONAL PSYCHOLOGY 437–38 (5th ed. 2008).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See e.g., LEVINE, *supra* note 13, at 40 (reporting that, for a time, CRS sent staff members to question local residents about their impressions of CRS's intervention); see also 2013 CRS ANN. REP., *supra* note 9, at 61 (CRS contacts local officials to ascertain satisfaction and the status of the conflict).

¹⁶⁵ See Cathy A. Costantino, *Second Generation Organizational Conflict Management Systems Design: A Practitioner's Perspective on Emerging Issues*, 14 HARV. NEGOT. L. REV. 81, 82, 86–88 (2009) (“How do conflict management systems fit with other processes and initiatives within an organization?” “[I]s it reasonable to expect that these procedures will stand the tests of time, cost, leadership, crisis, and fatigue?”).

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number of cases handled, sets rule-based procedures for decisions about when and how to intervene, hires those more likely to react than act proactively, and selects leaders who decide slowly and take few risks.¹⁶⁶ The Maryland example just discussed illustrates how the state's highest court set up separate expectations and procedures for MACRO, its office that would hire intervenors for polarized community conflicts, to avoid this potential disconnect in climate and culture between what would best serve an appellate court and what would best serve an office of intervenors.¹⁶⁷

Even one lever set incorrectly can undermine the creation of an optimal environment for intervenors. Autocratic leaders, for example, might generate less independent thinking and risk-taking than consultative leaders, according to organizational experts, making some leadership structures less than ideal for intervenors.¹⁶⁸ Unintended consequences like this—as well as the tendency of court mediation units to drift toward the climate and culture of the court overseeing them—suggest the importance of reexamining climate and culture at intervals.¹⁶⁹ In short, creating and maintaining a constructive climate or culture for intervenors always represents a challenge, and even more so when the overall institutional climate and culture does not fit the intervention function.

2. Accountability

Public funders hold public agencies accountable, and what the funders measure to assess success may influence that agency's climate and culture. In fact, intervenors may assume that agency's accountability measures define how supervisors will judge their work—absent contrary evidence.¹⁷⁰ For example, if the public agency reports to funders on the number of cases handled and the number resolved, intervenors may narrow the issues they

¹⁶⁶ Rothman (2012), *supra* note 73, at 191, 199, 203; Rothman (2006–2007), *supra* note 73, at 105, 128. See Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 878–79, 883 (2012); Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, A Time of Change*, 95 MARQ. L. REV. 993, 993–94, 998–99, 1006 (2012); Macfarlane, *supra* note 158, at 931. The involvement of attorneys, and their tendencies toward an adversarial approach may also affect the culture. See generally RIGGIO, *supra* note 161, at 437–38 (Regarding analogous effects for court-connected mediation).

¹⁶⁷ See *supra* text accompanying notes 145–52.

¹⁶⁸ LANDY & CONTE, *supra* note 152, at 564. See also Tahir Saeed et al., *Leadership Styles: Relationship with Conflict Management Styles*, 25 INT'L J. CONFLICT MGMT 214, 222–23 (2014).

¹⁶⁹ Carlson & Anderson, *supra* note 120, at 14–16.

¹⁷⁰ OSTROM ET AL., *supra* note 153, at 5.

address to those that can be resolved quickly based on assumptions that they will be rewarded for pleasing the agency's funders. Though accountability to funders creates a tension with the desire to create the optimal culture, those supervising the intervenors will lose funding (and their own jobs) unless they can be accountable.

Defining success in mediation has been problematic in any event.¹⁷¹ But the task becomes more difficult for polarized conflict intervention because the most obvious criterion—percentage of cases settled—does not fit for polarized conflicts. Also, the often-broad confidentiality strictures preclude describing in detail the intervenors' work.¹⁷² Even CRS has struggled to be accountable to Congress.¹⁷³ In his insightful history of CRS's first 25 years, former CRS staff member, Bertram Levine, pointed out that CRS had no constituency supporting it and had trouble showing success.¹⁷⁴ "How can one show that violence would have occurred, for example, absent intervention?" Levine asked rhetorically.¹⁷⁵ Levine explained that CRS, though, developed an overall strategy that was consistent with that of the U.S. Department of Justice and, for a time, sent follow-up interviewers to determine whether strategic goals were achieved in a given intervention.¹⁷⁶

CRS also finessed the accountability questions because Attorneys General tended to lend influential support for CRS budgets with Congress.¹⁷⁷ Sometimes, Levine reported, an Attorney General had to make a personal plea to the President to save CRS from the federal budget officials seeking to zero out its funding.¹⁷⁸ In the Attorney General, CRS had a powerful ally who understood and would vouch for what was being accomplished when those accomplishments could not easily be measured and stories could not be recounted in detail.

Still, CRS administrators wanted more funding on occasion and sought to justify their requests. As former CRS regional administrator Richard Salem recalled:

¹⁷¹ Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the "Semi-formal,"* in *REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS* 419, 447-448 (Felix Steffek et al. eds., 2013).

¹⁷² See *infra* text accompanying notes 220-22, 241-43.

¹⁷³ See *infra* text accompanying notes 180-83.

¹⁷⁴ LEVINE, *supra* note 13, at 230-32. See also 2013 CRS ANN. REP., *supra* note 9, at 61 ("The level of satisfaction among the recipients of CRS services is a critical indication of whether CRS has been successful.").

¹⁷⁵ LEVINE, *supra* note 13, at 230-31.

¹⁷⁶ *Id.* at 40.

¹⁷⁷ *Id.* at 234-35.

¹⁷⁸ *Id.* at 234.

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Well, you are always trying to project your successes in a bureaucracy. Information is always needed for budget purposes, annual reports, monthly reports, you are always expected to put your best foot forward. People need achievements.... So at times we didn't think of how you measured success, we just thought of what our best foot forward was. At times we were trying to show how many dollars were saved in mediated case, rather than a court case.¹⁷⁹

Heightening the accountability challenges, volatile community conflicts may spawn politically charged interference with funders.¹⁸⁰ Levine noted that members of Congress sometimes called to ask why a federal official was talking with "troublemakers."¹⁸¹ Reflecting this phenomenon more recently, some blogs attacked CRS for instigating trouble in Sanford because CRS officials mixed into crowds of demonstrators¹⁸² though a local paper noted that CRS mediators did so for demonstrations on all sides of the issues.¹⁸³

In sum, accountability to those funding the interventions in polarized conflicts always represents a challenge, and the need to do it complicates the task of maintaining the climate and culture needed for effective intervention.

3. *Resolving the Tensions Between Climate/Culture and Accountability*

A few existing institutional approaches suggest several sound ways that leaders could respond to Question Two, taking into account the tensions between the need to be accountable and the desire to create a productive climate and culture.

Having administrators handle accountability pressures while protecting intervenors from these pressures: As Richard Salem suggested above regarding putting the best foot forward, administrators could report to funders according to criteria that the funder valued, while announcing different criteria internally to set the expectations for intervenors and for the

¹⁷⁹ Oral History Project, *supra* note 13: Richard Salem (2000).

¹⁸⁰ See *infra* text accompanying notes 181–83.

¹⁸¹ LEVINE, *supra* note 13, at 237–40.

¹⁸² Katie Sanders, *Judicial Watch Says Department of Justice Unit Organized Protests Against George Zimmerman*, POLITIFACT (Jul. 12, 2013, 4:18 PM) <http://www.politifact.com/florida/statements/2013/jul/12/judicial-watch/judicial-watch-says-department-justice-unit-organi/>.

¹⁸³ *Id.*

climate or culture of the office of intervenors. CRS administrators felt the accountability pressures, as just discussed, but, interestingly, the intervenors themselves seemed not to be bothered by them. Several former CRS intervenors interviewed for an oral history project explained that they felt supported in their work but never knew exactly how their performance was being evaluated.¹⁸⁴ A couple of intervenors mentioned that the number of cases mattered to administrators in terms of counting them, but that administrators did not seem to use the number of cases to judge their success. As the result of this dichotomy, the intervenors did not feel pressures from administrators to avoid delving into the root causes of the conflicts.¹⁸⁵ Similarly, administrators responded to political heat, but no intervenors mentioned criticism from administrators for their doing their jobs in ways that might generate controversy.¹⁸⁶

Despite accountability pressures on CRS administrators, what Levine described as CRS's culture fit the multiple roles intervenors described above:¹⁸⁷ "a penchant for social justice and social action," "objectivity, honesty, and fairness in guiding the process so that both parties in a conflict would be able to negotiate," a concern that their work "make a difference," "flexibility," and commitment to formal training and informal exchanges on methods to deal with "thorny problems."¹⁸⁸ While ideally outside accountability standards would approximate the most productive inside accountability, even CRS has not always been able to achieve that. It seems unlikely that state and local level offices of intervenors will fare better than CRS in creating the right internal climate by persuading those appropriating funds to judge their success by criteria such as whether they dealt with root causes of conflict, whether they were proactive and creative enough, or whether their judgments in intervening were consistent with public policy. When standards needed for accountability and climate or culture diverge, reporting to funders using one set of criteria while evaluating intervenors based on other criteria may satisfy funders while helping to preserve a productive climate and culture, particularly if the leader of the larger agency (such as the U.S. Attorney General for CRS) understands in some depth the quality of the intervenors' contributions.

¹⁸⁴ Oral History Project, *supra* note 13, especially at <http://www.civilrightsmediation.org/interviews> (last visited Sept. 25, 2015) (nineteen former CRS intervenors were interviewed).

¹⁸⁵ Oral History Project, *supra* note 13, especially at <http://www.civilrightsmediation.org/topics/2720.shtml> (last visited Sept. 25, 2015).

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* Section II, Subpart J.

¹⁸⁸ LEVINE, *supra* note 13, at 237–40.

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Creating a single-purpose intervention agency: The leaders of public agencies set up solely to intervene in polarized conflicts—such as a specialized local community mediation program or a state-level public policy mediation agency—would not have to differentiate the climate and culture for the office of intervenors from that of a larger agency. The single purpose agencies, though, may more often lack a powerful leader like the governor or attorney general who can defend the budget, vouch for its value, and avoid the numerical accountability measures so difficult for intervenors to meet while doing their jobs in an effective way.¹⁸⁹ As discussed below, community mediation programs have suffered in public funds discussions, perhaps in part for this reason.¹⁹⁰ The single-purpose agency may be the best option in some situations but may be too expensive for small communities where such an agency's need would may not be constant, and, in any event, may not work for long.

Finding an institutional home that has a compatible climate and culture: One could argue that much about the U.S. Department of Justice climate and culture is consistent with that of CRS, and that the same statement might hold true for a state attorney general's office. As law offices, the attorney general office administrators may encourage creativity, share the devotion to justice, appreciate what would have occurred in a conflict absent intervention, and understand that quality professional work often defies numeric measure.¹⁹¹

Many state attorney general offices differ from the Justice Department though in a critical aspect. Most state attorneys general are elected,¹⁹² in contrast to the U.S. Attorney General, who is appointed by the President (subject to Senate confirmation).¹⁹³ Some state attorneys general, as a result, may be more concerned than the U.S. Attorney General about the political consequences of intervening in volatile conflicts. Still, some attorneys general would be willing to undertake the risks associated with intervening in

¹⁸⁹ See Tim Hedeem & Patrick G. Coy, *Community Mediation and the Court System: The Ties That Bind*, 17 *MEDIATION Q.* 351, 353–59 (2000) (noting tendency of community programs to move closer to courts in order to receive funding and referrals but then losing the culture that their founders envisioned).

¹⁹⁰ See *infra* text accompanying note 269; see *supra* text accompanying notes 122–23.

¹⁹¹ I found this to be the case during my tenure as Ohio Attorney General in 2008–2009.

¹⁹² NAT'L ASS'N OF ATTY'S GEN., <http://www.naag.org/naag/attorneys-general/whos-my-ag.php> (last visited Sept. 25, 2015) (listing 43 elected and 14 appointed attorneys general for U.S. states, territories, and protectorates).

¹⁹³ U.S. CONST. art. II, § 2.

raging conflict, and their offices offer a compatible culture for the intervention work.

Similar questions might be raised for other agencies. For example, universities might fare well in fostering a creative climate and culture but poorly in valuing intervenors' contributions to the community as a whole as opposed to the universities' teaching and research functions or to staff interventions within the university.¹⁹⁴ Those designing a university-based office would need to alter the climate and culture for the offices of intervenors. For example, a public agency might contract with universities for the time of university-based intervenors for individual engagements, as illustrated by several successful interventions discussed in this article, relieving the professors of teaching and writing obligations for that period.¹⁹⁵ Civil rights and equal opportunity offices that process individual discrimination complaints might share concern for justice with the intervenors, though processing individual complaints expeditiously might take precedence over funding intervenors when administrators have to cut the budget.

These examples illustrate how the designer for an office of intervenors might create convergences between the productive climate and culture needed for intervenors and for the overall public agency.

Contracting out the intervention: Occasionally a court can help provide the needed local involvement when other state or local officials cannot figure out a way to manage the tensions between accountability and creating the necessary climate and culture. For example, in the aftermath of the 2001 Cincinnati riots following police shooting of an African-American youth, U.S. District Judge Susan Dlott charged a special master mediator (whom she had already appointed in a civil rights suit against the police) to engage community representatives in planning changes in that community related to racial justice, asking the parties to fund the intervention.¹⁹⁶

The court did not intervene as quickly as Sanford officials though.¹⁹⁷ By the time the court mediation (pending before the shooting) turned to the broader issues, Cincinnati had endured several days of demonstrations and

¹⁹⁴ POLICY CONSENSUS INITIATIVE, FINDING BETTER WAYS TO SOLVE PUBLIC PROBLEMS: THE EMERGING ROLE OF UNIVERSITIES AS NEUTRAL FORUMS FOR COLLABORATIVE PROBLEM SOLVING 5–6, 10–11 (2005) (most university-based programs surveyed reported spending less than half of their time intervening in conflicts).

¹⁹⁵ See *supra* text accompanying notes 145–52, 196–99; see *infra* text accompanying notes 201–07 (discussions of the Snake River, Frostburg, and Cincinnati interventions).

¹⁹⁶ See THE JUD. CONF. OF THE U.S. COMM. ON CT. ADMIN. AND CASE MGMT., CIVIL LITIGATION MANAGEMENT MANUAL 84–85 (2d ed. 2010) [hereinafter Federal Litigation Manual] (setting fees); FED. R. CIV. P. 53(g).

¹⁹⁷ See *supra* text accompanying notes 26–34.

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rioting; injuries to demonstrators, police, and people driving by; and scores of arrests.¹⁹⁸ People's trust of and deference to the federal court resulted in participation by all of those invited and, to the point of Question Two, there was no indication of political interference in the process nor need to respond to the court's case processing goals except to conclude relatively soon (they reached agreement after nine months of discussions).¹⁹⁹

Contracting out the intervention—as in the Cincinnati federal court intervention—may be the next best option for dealing with the climate and culture challenge if a public agency cannot create a subculture for its office in charge of intervening in polarized conflicts. Sometimes courts ask CRS mediators to intervene, thereby using someone steeped in the climate and culture of that office.²⁰⁰

Absent the CRS option, public officials may contract with a private mediator. As with the story regarding Frostburg State,²⁰¹ this may work out effectively sometimes, though much will depend on the intervenor and the details of the arrangement with the court, as the next story illustrates.

What appeared based on pleadings to be a legal dispute over water rights had, just under the surface, the indicia of a polarized conflict. The broader conflict involved treaties with Native American tribes regarding fishing and water rights and strong resentments about what were perceived as treaty breaches, as well as water claims related to the livelihood of others, deeply-held environmental values, and more. Some parties characterized these at the outset to be "intractable issues of principle."²⁰² Francis McGovern, then a University of Alabama law professor, mediated the conflict for an Idaho court beginning in 1987. He had to persuade constituencies that were not parties to the litigation to become engaged. In order to maintain trust, the parties agreed that McGovern would not have ex parte conversations with the judge, except about logistics.²⁰³

¹⁹⁸ Rothman (2006–2007), *supra* note 73, at 110, 127–28; *Calm Urged after Rioting in Cincinnati, Clergy Call for Peace after Youth's Killing*, PHILLY.COM (Apr. 12, 2001), http://articles.philly.com/2001-04-12/news/25332708_1_black-men-black-youth-white-police-officer.

¹⁹⁹ Rothman (2006–2007), *supra* note 73, at 105–06, 127–28.

²⁰⁰ LEVINE, *supra* note 13, at 183–92. See Michael K. Lewis, *The Special Master as Mediator*, 12 SETON HALL LEGIS. J. 75, 75–76 (1988); Paul Tractenberg, *Court-Appointed Mediators or Special Masters: A Commentary*, 12 SETON HALL LEGIS. J. 81, 81–85 (1988) (regarding special masters).

²⁰¹ See *supra* text accompanying notes 145–52.

²⁰² McGovern, *supra* note 74, at 547–48, 562.

²⁰³ *Id.* at 558.

The number of stakeholders was formidable so McGovern came up with a novel process. He began with a small number of lawyers and then, after reaching some tentative consensus among that group, expanded in concentric circles until he had involved a broad number of constituencies on the terms of an agreement.²⁰⁴ McGovern noted that the parties could, through the settlement, "reconcile their philosophical and cultural differences in the context of a pragmatic allocation of resources and management that satisfied their respective needs."²⁰⁵ The results, after six years of the process, included federal and state legislation, about \$200 million in federal funds, cooperative management of water, and more.²⁰⁶

By appointing McGovern, the court may have incorporated a university culture that favored the flexibility and creativity in thinking needed for such an intervention.²⁰⁷ The presence of related litigation and a judge willing to take the initiative is not the norm, however. Further, agencies that contract out all interventions may lack the knowledge and facility to intervene proactively to deal with likely future conflicts.²⁰⁸

These examples and the cautionary tale of court-annexed mediation demonstrate the tensions between providing an ideal climate and culture for intervenors and maintaining accountability for public funds. They also underscore the importance of asking and answering Question Two; otherwise the public agency may lose funding for the interventions or send out ineffective intervenors.

C. Question Three: Will the office of intervenors juggle effectively the sometimes competing tasks of (a) developing trust in the intervenor and the process, (b) protecting the other roles played by that public agency, and (c) providing the range of resources needed to succeed?

²⁰⁴ *Id.* at 562.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 559, 562.

²⁰⁷ See Nanci S. Klein, *Community Mediation and the District Court—A Collaboration That Is "Two Thumbs Up"*, 75 MICH. B.J. 158, 158–61 (1996) (for a suggestion that courts accomplish something similar by referring to community mediation programs).

²⁰⁸ Carlson & Anderson, *supra* note 120, at 13. ("Interviewees ... described how agencies, in response to what they have learned from involvement of mediation, have made operation changes, moving 'upstream' to try to resolve issues before they become deeply entrenched disputes.... [O]ver time, agency staff have started doing more and more of this work themselves.").

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Each task that this section examines—developing trust, protecting other roles, and providing a range of resources—has been critical to success in some interventions into polarized conflicts,²⁰⁹ and yet strategies to implement them sometimes conflict. A court, for example, may engender sufficient trust and credibility to engage all stakeholders and may possess the authority to impose costs on the parties.²¹⁰ If courts became primary providers of intervention, though, some will express concern about whether these activities will compromise the courts' role as adjudicators.²¹¹ Also, as discussed in the last section, the case resolution orientation of courts, as well as the courts' concern about critiques of their long-term involvement in supervising consent judgments, may work against continuing the intervention long enough to assure implementation.²¹² To continue the court example, the court may still be the best agency for managing a given intervention, but only if the court walls off the negotiations from the judge assigned to decide the cases arising out of the conflict and only if the court only selectively plays this role.²¹³

1. *Developing Trust in the Intervenor or Intervention*

CRS intervenors note that people—even people who distrust local officials—tend to be willing to talk with intervenors who can say either that they are Justice Department officials or that they come from CRS.²¹⁴ As the minister of a nearby community said about a CRS mediator in Sanford, “He was able to get the largest group of pastors together, partly because his group carried weight, representing the perspective of the Justice Department.”²¹⁵ Also, CRS officials use the time between crises to cultivate relationships with city officials and pertinent groups within their regions.²¹⁶ As just mentioned, when courts ask non-parties to participate, they too are often successful, perhaps because people respect the neutrality and prestige.²¹⁷ Local officials whom residents trust may also serve as effective convenors.²¹⁸

²⁰⁹ See *infra* Subparts 1–3.

²¹⁰ See *supra* text accompanying notes 196–99.

²¹¹ See *infra* text accompanying notes 241–54.

²¹² See *supra* text accompanying notes 155–59; see *infra* text accompanying notes 260–61.

²¹³ See *infra* text accompanying notes 241–43.

²¹⁴ See, e.g., Oral History Project, *supra* note 13.

²¹⁵ Burch, *supra* note 29 (quoting Rev. Charles Holt of St. Peter’s Episcopal Church in Lake Mary). See *supra* text accompanying notes 26–34.

²¹⁶ Telephone Interview with a CRS Mediator (Mar. 13, 2014).

²¹⁷ See *supra* text accompanying note 210.

²¹⁸ COLEMAN, *supra* note 10, at 14–18.

Personal respect for a particular intervenor or a group of sponsors may have similar results.²¹⁹ Though a variety of approaches work, intervenors succeed only if they find a way to engender trust and engagement.

The 1964 legislation establishing CRS included a provision that separates CRS intervenors from law enforcement activities, providing another advantage in gaining candid participation. The statute authorizing CRS prohibits CRS officials from disclosing information from its interventions to others outside CRS, including to colleagues within the Justice Department. In fact, it is a crime for them to do so.²²⁰ Such a provision encourages participation by those wary of the Justice Department's investigatory arm.²²¹ Recognizing the role of confidentiality in engaging reluctant parties, Grande Lum, its current director, is quick to point out that CRS "does not have investigatory or enforcement authority" but rather focuses on "crafting collaborative solutions that meet the underlying needs of parties," and building trust with local leaders by maintaining confidentiality, even with regard to others within the Department.²²²

Commentators have noted the contribution that cordoning the intervenors from the managing agency's other roles makes in gaining trust.²²³ Understanding this, intervenors "make do" when not protected by a statutory provision such as that governing CRS. McGovern, the mediator in the Snake River Basin case,²²⁴ established confidentiality between the mediation and the court by agreement.²²⁵ Sometimes a local civil rights agency has one staff member intervene in polarized conflicts, with a practice that no information

²¹⁹ James H. Laue, *Getting to the Table: Creating the Forum for Negotiations in Deep-Rooted Conflicts*, 10 SOC. PRAC. 134, 140–46 (1992); Carpenter, 1999, *supra* note 13, at 61, 63; CARPENTER & KENNEDY, *supra* note 17, at 106. Regarding racial or ethnic diversity of the intervenors and gaining trust in particular contexts, *see generally* Liebman, *supra* note 96, at 273–74; PETER T. COLEMAN, *supra* note 70, at 142–43; Stulberg, *supra* note 105, at 321.

²²⁰ 42 U.S.C.S § 2000g-2 (2015).

²²¹ 2012 CRS Annual Report, *supra* note 45, at 34 ("CRS has no law enforcement responsibilities; it does not investigate alleged violations of the law, nor does it prosecute alleged law violators. CRS also conducts its work confidentially. As Justice Department representatives, CRS mediators have the credibility and trust to work effectively with people on all sides of the conflict.").

²²² Profiles in ADR, *supra* note 30.

²²³ 2004 *Special Masters Conference: Transcript of Proceedings*, 31 WM. MITCHEL L. REV. 1193, 1198 (2004); Lewis, *supra* note 200, at 75; McGovern, *supra* note 74 at 547–48.

²²⁴ *See supra* text accompanying notes 201–07.

²²⁵ The Civil Litigation Management Manual recommends for federal litigation that provisions regarding confidentiality be put in the order referring the case to a special master for mediation. Federal Litigation Manual, *supra* note 196, at 86–87.

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passes to its investigation and hearing processes.²²⁶ These informal measures may encourage candor and engagement in intervention processes, though, as noted later, the lack of legal protection may occasionally render them useless.²²⁷

Involving potential participants in planning the process may be another way to generate the needed trust and engagement for agencies that otherwise would not have the respect that the public has for the courts, local officials, U.S. Department of Justice, or the personal regard of well-known intervenors. In the next story, private and state university actors combined resources and involved local people in creating the process. They achieved success in engaging a broad array of public officials and interest groups, though with an ironic follow-up story.

The only physician in Catron County, New Mexico in 1995 noticed an increase in depression, anxiety, family violence, and substance abuse and attributed these increases to an escalating community-wide conflict.²²⁸ What had begun as a disagreement about logging and grazing on the federal lands in this rural county had quickly turned bitter.²²⁹ Environmental activists, loggers, and ranchers sued the U.S. Forest Service, but that was only the beginning.²³⁰ The county commissioners called for the arrest of any federal official interfering with the “custom and culture of the people,” purported to require “environmentalists” to “register with the county prior to doing any assessments on land within the county borders,” and urged all households to have a gun.²³¹ Forest Service Rangers feared for their lives.

The physician sought help from a public health professor at the University of New Mexico who suggested intervention by a nonprofit community mediation center, the New Mexico Center for Dispute Resolution, based in Albuquerque.²³² The center’s director asked the physician to identify and convene a group representing the factions—roughly ranchers, loggers, national environmental advocacy groups, the U.S. Forest Service, and local government. These representatives respected the sincerity of the physician’s

²²⁶ Telephone Interview with a CRS Mediator (Mar. 13, 2014).

²²⁷ See *infra* text accompanying notes 241–43.

²²⁸ Smith, *supra* note 83, at 985, 989.

²²⁹ *Id.* at 985–89.

²³⁰ *Id.* at 988.

²³¹ *Id.* at 987–88.

²³² *Id.* at 989.

concern and neutral stance, and most came, though they later admitted that they had little confidence that talking would produce anything of value.²³³

The University of New Mexico awarded a grant that permitted first the Center and then outside mediators to facilitate talks over time. For six months, members of the group explained their points of view to each other. They then set up a process to engage even more stakeholders in discussing their interests and developing options for achieving them.²³⁴

A year later, representatives of the diverse stakeholders were working together, making progress where they could, and regularly talking through differences. Two years later, they were ready to share their positive experiences with other communities. The people of Catron County no longer lived in fear of each other, and, in the view of the original intervenor, felt pride and engagement in their community.²³⁵

The secrets to engaging the Catron County participants were, first, an invitation from the physician they all trusted and, second, the participants' involvement in creating the process. A community in Oregon used a similar approach when federal officials limited logging on federal lands to protect the northern spotted owl, with a respected local environmentalist convening stakeholders at a potluck meal at his home and a participant-designed process following that.²³⁶

Observing the Oregon community's success, the U.S. Department of Interior tried to replicate that success in ten other counties with spotted owls and logging on federal lands.²³⁷ It copied the stakeholder groups from the

²³³ *Id.* The national environmental groups, though, resisted at various times, concerned that their participation in a consensus-building process might reduce the pressures for increased environmental enforcement. *Id.* at 995.

²³⁴ Additional foundations provided the help to continue the process. The U.S. Department of Agriculture made experts available to help all groups understand the scientific basis for environmental concerns. The Department also provided a mediator to produce consensus on some specific issues. *Id.* at 993–99, 1007.

²³⁵ See Sam Burns, *Catron County, New Mexico: Mirroring the West, Healing and Rebuilding Community*, in *FOREST COMMUNITIES, COMMUNITY FORESTS: STRUGGLES AND SUCCESSES IN REBUILDING COMMUNITIES AND FORESTS* 89, 114 (Jonathan Kusel & Elisa Adler eds., 2003) (author comes to a similar conclusion about the success of the intervention in Catron County).

²³⁶ Chris Carlson, *Convening*, in *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* 169, 172–73 (Lawrence Susskind et al. eds., 1999).

²³⁷ Christine Carlson suggests that the problem was not that the federal government convened the stakeholders but that the government did not go through the initial steps of collaborative design with stakeholders so the stakeholders were worried about such things as “the federal government’s motives, the balance of power at the table and the

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successful intervention and contracted with outside mediators.²³⁸ But, by one account, all ten of these interventions floundered because people attended a few meetings and then quit participating.²³⁹ According to an experienced mediator, those invited had not been involved in the design; they did not trust or feel committed to the process.²⁴⁰

In other words, many paths might lead to this trust and engagement, but the designer for the office of intervenors should make certain that its combination works. Otherwise, no meaningful consensus will result.

2. *Protecting the Public Agency's Other Roles*

Those public agencies that might be most attractive in terms of gaining stakeholders' trust may also be agencies whose other roles might be compromised if they administer interventions in polarized conflicts. The risks might include transmission of information that otherwise would not be considered by decision-makers, bias as the result of investment in the success of the intervention, loss of public confidence in the agency, and distraction.

Confidentiality with regard to an agency's other roles, considered in the last section as a means to gain confidence of stakeholders, may also avoid biasing decision-makers in their enforcement or judicial functions.²⁴¹ By keeping from judges or prosecutors what intervenors learn from stakeholders, for example, one avoids familiarizing them with facts that might bias, or be viewed as biasing, future rulings or decisions. To be effective in this context, though, planners may need to establish confidentiality by law, as Congress did in the statute establishing CRS.²⁴² Otherwise, the courts may enforce subpoenas that require disclosures of information that the intervenors hoped would be held confidentially.²⁴³

availability of resources to enable all groups to participate on an equal footing." She cites to B. KenCairn, *The Partnership Phenomenon*, 3 CHRONICLE OF COMMUNITY 37, 37-41 (1997). Carlson, *supra* note 236, at 172-73.

²³⁸ Carlson, *supra* note 236, at 172-73.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ ROBERT J. NIEMIC, DONNA STIENSTRA & RANDALL E. RAVITZ, GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR § X (Federal Judicial Center 2001); Federal Litigation Manual, *supra* note 196, at 86, 157-59 (recommending that the referral order provide "instructions regarding confidentiality of the proceedings and communications between the judge and the neutral").

²⁴² 42 U.S.C.S § 2000g-2 (2015).

²⁴³ 1 COLE ET AL., *supra* note 62 §§ 8:37-8:39 ("Agreements not to disclose, subpoena, or offer in evidence information conveyed during a mediation do not necessarily fully protect information from disclosure. Courts sometimes view such

Protecting a public agency's other roles also includes preserving public regard for that agency. The selection of a neutral, for example, may need to be transparent and seem fair in order to avoid public perceptions of cronyism.²⁴⁴ For this reason, the Maryland court program had intervenors on retainer who could act quickly when necessary, but with the further provision that they be replaced as soon as feasible by intervenors selected through a public bidding process.²⁴⁵ Though this means that two intervenors must learn about the local situation and develop trust, preserving public confidence may be worth the added expense. And the sequential intervenors may still cost less than a staff model in which intervenors do not have enough work to remain busy.

Another aspect of public regard may be more difficult to manage, however. Court-appointed intervenors could arguably undermine public confidence in a court's neutrality if "courts are constantly drawn into and then quartered over intensely difficult political issues" according to one court expert.²⁴⁶ If courts decided that he is right, courts might decide to stay out of the most volatile disputes—arguably those in which intervention matters most.

In the case of the courts, scholars also argue that a judge focused on managing collaborative processes will favor one party in unreviewable ways, will pressure parties to accept less than they could achieve through litigation, will be distracted from adjudicative functions and therefore less effective as adjudicators, and will be partial in making rulings (including rulings in the case involving the intervention if the judge becomes invested in the success of the intervention).²⁴⁷ Others add that the public will be confused about the

agreements as attempts to suppress evidence making the agreements void as against public policy." § 8:37. Protective orders providing for confidentiality may sometimes be set aside. § 8:34.).

²⁴⁴ Federal Litigation Manual, *supra* note 196, at 84–88; Sandra S. Beckwith, *District Court Mediation Programs: A View from the Bench*, 26 OHIO ST. J. ON DISP. RESOL. 357, 360–61 (2011) (regarding court-appointed mediators); Peter W. Agnes, Jr., *A Reform Agenda for Court-Connected Dispute Resolution in Massachusetts*, 40–APR BOSTON B.J. 4 (1996) (noting potential problems and suggesting remedies).

²⁴⁵ See *supra* text accompanying note 150.

²⁴⁶ ALEXANDER B. AIKMAN, *THE ART AND PRACTICE OF COURT ADMINISTRATION* 77 (2007).

²⁴⁷ Fiss, *supra* note 140, at 1277 ("Sometimes judges step in and try to facilitate the bargaining process and thus encourage settlement; sometimes they even insist upon it."); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424–31 (1982); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHICAGO L. REV. 494, 536–39 (1986); Judith Resnik, *Managerial Judges, Jeremy Bentham and the Privatization of Adjudication*, 49 SUP. CT. L. REV. 2D 205, 211–12 (2010); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP.

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judges' roles,²⁴⁸ especially as the judges interpret and enforce consent decrees that include relief that the court might not have provided in a decision on the merits²⁴⁹ or assume oversight of local government functions like schools or prisons.²⁵⁰

Still other commentators disagree that these concerns merit ousting the courts as sponsors for collaborative processes.²⁵¹ In their view, lawyers believe that judges work more effectively when they actively manage their cases.²⁵² They also point out that sponsoring collaborative procedures does

RESOL. 211, 260–62 (1995). Cf. Paul M. Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 SAN DIEGO L. REV. 373, 408 (2012) (dealing with specialty courts).

²⁴⁸ Fiss, *supra* note 140, at 1280 (“Judges are judges, not brokers of deals, and I fear that a too-ready acquiescence in the directives of those who want them to behave otherwise will—not in a day, but over time—diminish their authority in the eyes of the community.”).

²⁴⁹ Alan Effron, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 COLUM. L. REV. 1797, 1810 (1988) (“The Supreme Court has thus given its imprimatur to the notion that the remedial relief embodied in a consent decree may go significantly beyond what a federal court could itself order upon the merits.”); Cf. David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary of the Supreme Court’s Adoption of the Second Circuit’s Flexible Test*, 58 BROOK. L. REV. 1239, 1239–40 (1993); Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1161–62 (1986) (“Modification decisions [for decrees, including consent decrees] are, therefore, idiosyncratic. Yet, principled consideration of modification motions is necessary if those decisions are to be legitimate...”).

²⁵⁰ See generally 18 U.S.C. § 3626(b) (1997) (providing for prison consent decrees or certain other injunctions to terminate within two years absent special findings for continuation); Philip B. Kurland, “*Brown v. Board of Education Was the Beginning*”: *The School Desegregation Cases in the United States Supreme Court: 1954–1979*, 1979 WASH. U. L.Q. 309.

²⁵¹ Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 688 (2010) (“[T]he recent survey data give welcome cause for hope that the path [regarding case management] we have pursued for the last thirty years has not been one giant misstep and may even have been the right step.”); Michael Moffitt, *Three Things to Be Against (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203, 1245 (2009) (“If Against Settlement means what its language implies—that one could do away with settlement, retain litigation, and be better off for the change—then the article’s thesis is flawed both as a theoretical and as a practical matter.”); Sturm & Gadlin, *supra* note 141, at 52; Jack B. Weinstein, *Comments on Owen M. Fiss, Against Settlement (1984)*, 78 FORDHAM L. REV. 1265, 1272 (2009) (“Exercise of sound judgment by administrative agencies, lawyers, corporations, and individual litigants in the criminal and civil justice systems is required to find the right mix of settlements and trials in the many distinctive disputes that our contemporary complex society produces.”).

²⁵² Gensler, *supra* note 251, at 681.

not undermine confidence in the justice system if intervenors maintain neutrality (perhaps including some distance between judges and intervenors), do what is promised in a way that the public can understand, allow people to express their views, and “respect” people and their rights.²⁵³ In fact, the public sometimes approves of a court that becomes involved in solving the community’s problems.²⁵⁴

In particular contexts, this theoretical debate might play out differently. For example, if people already distrust the way that a court is trying protestors, the public might think it inappropriate for the court to oversee an intervention in the larger, community-wide conflict.

Of course, a single-purpose organization avoids some of these mixed role dilemmas. A public funder might award a grant to intervene in polarized conflicts, for example, to a nonprofit local community mediation program (like the New Mexico center just discussed).²⁵⁵ While avoiding harm to the public agency’s role, the single-purpose agency lacks the public recognition of larger agencies like an attorney general’s office or court, thus perhaps compromising the intervenors’ abilities to engage participants, the focus of subpart 1. In short, single-purpose agencies pose no role dilemmas, but create other problems at times. It becomes critical for this reason that those designing offices of intervenors learn to deal with the mixed roles and climates or cultures of larger public agencies.

3. *Accommodating Extensive, Long-Term, and Changing Needs for Resources*

Consider the length of involvement in each of these stories: two years and counting in Sanford,²⁵⁶ Catron County,²⁵⁷ and Frostburg²⁵⁸ and six years for the Snake River Basin.²⁵⁹ The Cincinnati court mediation concluded more

²⁵³ KEVIN BURKE & STEVE LEBEN, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION 6, 9 (2007) (American Judges Association 2007) (after problem-solving courts were started, the public’s outlook toward the court improved.); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 3 (2011).

²⁵⁴ Burke & Leben, *supra* note 253, at 9 (reporting that the percentage of the Brooklyn public’s positive outlook toward the courts increased from 57% to 78% in the first two years of operation of a problem-solving court docket in which judges work with defendants as they use community organizations to turn around their lives).

²⁵⁵ See *supra* text accompanying notes 228–35.

²⁵⁶ See *supra* text accompanying notes 26–34.

²⁵⁷ See *supra* text accompanying notes 228–35.

²⁵⁸ See *supra* text accompanying notes 145–51.

²⁵⁹ See *supra* text accompanying notes 201–07.

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quickly (nine months),²⁶⁰ but the mediator noted that as a shortcoming in achieving long-term solutions. One of the problems of “parachuting in,” he said, and then leaving Cincinnati was that there was no re-connection with those who participated and no continuing group to deal with emerging problems, no “institutional memory,” and no “internal ownership of the process.”²⁶¹ The intervention may extend beyond the anticipated schedule because of changes in political leadership or other unanticipated developments.²⁶² The long-term nature and unpredictability of the timeframe may confound agency budget planning.

The changeable nature of the intervention heightens budget planning difficulties, as the conflict intervention often evolves to require space, educational resources, experts, and more.²⁶³ In the stories in this article, public officials found experienced and able intervenors, but that, too, may become a resource issue if more state and local communities begin to use intervenors on a wider scale.

Unfortunately, public funding for interventions in polarized conflicts seems especially vulnerable to cuts,²⁶⁴ posing the possibility that an intervenor will have to leave in the midst of the task. Ironically, the public agencies best able to garner funders’ respect and therefore the leeway to use resources flexibly, such as the courts or attorney general offices,²⁶⁵ may cut their intervention functions first in a budget crisis.²⁶⁶ By analogy, in times of budget cuts, mediation programs for legal disputes reported pressures to produce high settlement rates and reduce time per mediation, and threats to cut all funding because mediation does not fall within the “core” of the court’s mission.²⁶⁷ Court-funded intervention programs such as Maryland’s MACRO (as opposed to court-ordered interventions that parties fund) may

²⁶⁰ Rothman (2012), *supra* note 73, at 199.

²⁶¹ *Id.* at 199–200. *See also* Matz, *supra* note 101, at 20.

²⁶² Potapchuk & Crocker, *supra* note 85, at 551–53.

²⁶³ Carpenter, 1999, *supra* note 13, at 61, 97.

²⁶⁴ Carlson & Anderson, *supra* note 120, at 15–16.

²⁶⁵ Christine Carlson & Sanford M. Jaffe, *Statewide Offices – The Experts’ Views*, in STATEWIDE OFFICES OF MEDIATION: EXPERIMENTS IN PUBLIC POLICY 5, 11 (National Institute for Dispute Resolution Forum 1987) (“By working with the state court systems, the state offices garner an additional degree of legitimacy and credibility.”). *See supra* discussion accompanying notes 178–79 (regarding U.S. Attorney General).

²⁶⁶ Welsh, *supra* note 166, at 878 (noting the irony that mediation proponents want to take advantage of the courts’ prestige while avoiding some of the implications of doing so). *See also* Menkel-Meadow, *supra* note 171, at 443 (reporting that a number of California courts terminated funding for mediation programs in 2012 when courts had to cut spending).

²⁶⁷ Welsh, *supra* note 266, at 879.

become susceptible in budget cutting to the argument that they are not “mission critical”—not “essential for the proper operation of the court, both to fulfill its adjudicative role and to be a viable branch of government.”²⁶⁸ Similar financial pressures affect agencies set up primarily to intervene.²⁶⁹ Even the New Mexico center that managed the Catron County intervention ran out of money and closed.²⁷⁰

In other words, funding issues become a counterweight at times to the ideal ways to combine public values and practical decision-making (Question One), desires to set the right climate and culture (Questions Two), and efforts to secure requisite trust and engagement and to protect the agency’s other roles (Question Three). Those who decide whether to intervene and how to shape the intervention should be realistic about whether they can marshal the resources to do so effectively. Asking the three questions with a sober assessment of resources will aid in achieving that.

IV. CONCLUSION

One *could* conclude with a pessimistic assessment (though I do not): states and localities lack the political will to institutionalize the capacity for experienced intervenors to help local communities deal constructively with polarized conflict. That was sociologist James Coleman’s take on the situation in 1957 after reviewing decades of studies of communities under stress.²⁷¹ “Each community,” Coleman said, deals with these conflicts “as if similar problems had never arisen elsewhere. Each community carries out for itself a trial and error process without benefit of the cumulative experience of other communities.”²⁷² Reviewing failures to apply cumulative experience and the consequences for those communities, Coleman warns that the effects of local community’s errors spread beyond the specific incident—they “[load] the dice in favor of a similar outcome the next time.”²⁷³

Giving reason for a more optimistic assessment, the creation of CRS in 1964 represented a shift from that approach.²⁷⁴ Congress recognized that

²⁶⁸ ALEXANDER B. AIKMAN, *THE ART AND PRACTICE OF COURT ADMINISTRATION* 211 (2007).

²⁶⁹ See *supra* text accompanying notes 228–35; Amsler, *supra* note 122, at 6 (“[T]he field’s community sector is pressed by a lack of financial stability and challenges to its own set of values.”); Corbett & Corbett, *supra* note 122, at 458–59.

²⁷⁰ See *supra* text accompanying notes 228–35.

²⁷¹ COLEMAN, *supra* note 10, at 4–5.

²⁷² *Id.* at 2.

²⁷³ *Id.* at 2.

²⁷⁴ 42 U.S.C.A. § 2000g–1 (2015).

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federal intervenors supplemented in valuable ways the crucial roles played by law enforcement and by changes in law.

The use of state or local intervenors in Sanford, Florida and in the article's other stories may herald yet another shift.²⁷⁵ As these stories illustrate, experienced state and local intervenors bring the cumulative lessons from other polarized communities and can make the difference between a community that solves problems and becomes resilient and one that explodes each time than an incident illuminates its divisions.²⁷⁶ When experienced and organized effectively, state and local intervenors can give immediate and trusted counsel to local officials, help them understand that CRS intervenors bring the valuable cumulative experience of intervening in other polarized communities, augment CRS intervenors, and take on CRS's role when it cannot be there. In addition, state and local intervenors stay on to re-build relationships, help the community create structures for to solve the problem illuminated by the trigger incident, and sow seeds to prevent future issues from polarizing the community. They may make that difference even in those jurisdictions that fund the interventions only for a time,²⁷⁷ as long as these intervenors have the resources and structure to intervene in a particular conflict in ways that are effective and consistent with public policy.

The article ends where it began—effective institutionalization at the state or local level for intervenors in polarized conflict matters but it requires more than money. Positive markers in achieving that success, which form the basis for the three questions suggested by this article, include, first, decision-making about when and how to intervene by public officials informed by feasibility; second, a hospitable work climate and culture for the intervenors and a workable approach to accountability to funders that does not undermine creation of a hospitable climate and culture; and, third, the ability to engender trust and engagement in the midst of an emotional and divided community, protection of the administering agency's other roles, and flexibility in providing resources.²⁷⁸ The article's three questions reflect these markers and represent "off-the-shelf" guidance as state or local officials begin planning, sometimes anew, to develop the critical capacity to intervene in polarized community conflict. Stories like Ferguson's,²⁷⁹ Sanford's,²⁸⁰

²⁷⁵ See *supra* text accompanying notes 26–34.

²⁷⁶ *Supra* Part II.

²⁷⁷ *Supra* Part III

²⁷⁸ *Supra* Part III.

²⁷⁹ See *supra* text accompanying notes 1–8.

²⁸⁰ See *supra* text accompanying notes 26–34.

Catron County's,²⁸¹ Frostburg's,²⁸² and the Snake River Basin's²⁸³ occur frequently and bring to life the urgency of getting the answers right.

²⁸¹ *See supra* text accompanying notes 228–35.

²⁸² *See supra* text accompanying notes 145–51.

²⁸³ *See supra* text accompanying notes 201–07.